Valenti was the managing owner of the *Carlos F. Roses*.

Both bills of exchange were cashed by the London River Plate Bank, Ltd., at Montevideo. On April 6th they were accepted by Kleinwort Sons & Company, and on May 9th were paid under discount by that firm (p. 19). It is alleged that at the time of the acceptance of the bills of exchange, bills of lading, covering the shipment of garlic and the jerked beef shipped for the account and by order of Pagés, endorsed in blank by Gibernau & Company, were delivered to the claimants, as security for the payment of the bills of exchange; and, thereafter the bill of lading, covering the shipment of jerked beef made for the account and by order of the *Carlos F. Roses*, was delivered, in like manner. It is alleged that, on April 9th, the bills of lading and invoices, covering the shipment of garlic and Pagés' share of the jerked beef, were mailed by Kleinwort Sons & Company to Gelak & Company, bankers, of Havana, to be held until the bill of exchange, charged to the account of Pagés, should be paid. Neither the instructions sent to Gelak & Company, nor a copy of them, were produced. It is alleged that the bills of lading and invoice covering the vessel's share of the shipment of jerked beef were retained by Kleinwort Sons & Company "pending the disposal of the said cargo." On May 17th, the day of the capture, Kleinwort Sons & Company cabled Gelak & Company requesting them to return the bills of lading and invoices which had been forwarded on April 9th. On June 9th, Gelak & Company replied that the bills and invoices had not been received (pp. 18–41). On October 21, the claimants produced these bills of lading, alleging that they had been received from Gelak & Company on October 18th (pp 35–36), and that neither Pagés, Gibernau & Company, nor the owners of the *Carlos F. Roses*

had paid the claimants anything for or on account of their acceptance and payment of the bills of exchange (p. 18).

The cause of the cargo was heard a second time upon the claim, test affidavit and Harcke's affidavits and a decree was entered, by which it was ordered that the claimants be paid an amount equal to the proceeds of the sale of the cargo (pp. 13–14). Thereupon, the United States took this appeal (pp. 15–17).

Assignments of Error.

We submit that the court below erred in the following respects (p. 15):

First. In holding that the cargo of the *Carlos F. Roses* was not lawful prize of war.

Second. In holding that the said cargo was privileged and exempt from capture and condemnation as property owned by neutrals.

Third. In dismissing the libel, so far as it related to the said cargo and ordering the proceeds of the sale of the same be paid to the claimants.

Fourth. In failing to hold that the said cargo was lawful prize of war and subject to condemnation as such.

ARGUMENT.

I.

The Cargo of the Carlos F. Roses was Enemy Property,

In its opinion, the court below did not make specific mention of the President's proclamation of April 26, 1898, in which it was provided :

"Second. Neutral goods not contraband of war are not liable to confiscation under the enemy's flag."

It is evident, however, that the decree of restitution was based upon the theory that the cargo, in some way, became the property of Kleinwort Sons and Company—British subjects—and thus came within this exemption.

The court having ordered further proofs, the burden of proving their ownership and the neutral character of the goods, by clear and positive evidence and beyond a reasonable doubt rested upon the claimants.

The London Packet, 5 *Wheat.* 132.
La Armisted De Rues, 5 *Wheat.* 385.
The Amiable Isabella, 6 *Wheat.* 1, 77.
The Santissima Trinidad, 7 *Wheat.* 283.
The Sally Magee, 3 *Wall.* 451.
The Jenny, 5 *Wall.* 183.

When the cause came on for hearing a second time, the claimants had wholly failed to prove their case. The three affidavits by Harcke and the exhibits which accompanied them were not competent evidence.

Under an order for further proof, the evidence must be in the form of depositions, taken under a commission, as in other admiralty cases, and of documents, duly proven.

3 *Greenleaf on Evidence*, §§ 457 *and* 467.
The George, 2 *Gall.*, 249, 252.
Rules, Supreme Court, U. S., § 12 ("*Further Proof*").

Claimants have not always been held to a strict compliance with this rule, but this court has always required that any affidavit, intended to be used as proof, should be taken under a commission, and all papers offered as

exhibits should be proved by persons who had personal knowledge of their execution.

The London Packet, 2 *Wheat.* 372, 373.
Story's Principles & Practice of Prize Courts, *p.* 58.

Manifestly it would be unjust to permit the claimant, by his *ex parte* affidavit, to present only such facts as he pleased and suppress others which might not be to his liking.

3 *Greenleaf on Evidence*, § 436.

Even if the substance of Hareke's affidavits and the exhibits had been established by competent evidence, the claimants would still have failed to show that the cargo of the *Carlos F. Roses* was neutral property.

The shippers, Gibernau & Company, were citizens of a neutral state, but it is not alleged or claimed that they retained the ownership of the cargo after its delivery to the vessel. They were commission merchants and in each invoice there appears a charge for their commission upon the shipment and in each it is expressly provided that the goods were shipped "*to order, for account and risk and by order*" of certain persons therein named. The consignees, named in the invoice, of the jerked beef were the owners of the vessel ("the expedition or voyage of the *Carlos F. Roses*") and "Mr. Pedro Pagés of Havana," all Spanish subjects. The consignees of the garlic were "Mr. Pedro Pagés" and Gibernau & Company ("the undersigned"). The ship's manifest signed three or four days after the invoices is not in accord with them. It shows that the goods were consigned "to order." This must have been an error, intentional or unintentional, for the vessel had a share in the shipment of jerked beef and the master must have seen that the

consignees were named in both invoices and that the shipments were made by their orders for their account and at their risks. A similar discrepancy appears in the bills of lading issued by the master to Gibernau & Company. There were three sets of bills. One covered the portion of the shipment of jerked beef made for the account of the vessel; another covered the part of that shipment made for the account of Pagés; the third, the shipment of garlic made for the joint account of Pagés and Gibernau & Company. All of the bills set forth that the goods were taken "for account of whom it may concern." This is an unusual thing in bills of lading (2 *Parsons on Contracts*, pp. 410–411) and in the present case, where the consignees were known to the master, it is difficult to see why he adopted such a course, if he were acting in good faith.

It is clear that when the goods were delivered to the vessel they became the property of the consignees, named in the invoices. Hence the shipment of jerked beef was owned by Pagés, or by him and the owners of the *Carlos F. Roses;* it is immaterial which, because all were Spanish subjects. One-half of the garlic belonged to Pagés. The remaining half was consigned to Gibernau & Company. This was the only part of the cargo having color of neutrality. Gibernau & Company did not claim it; therefore, it should have been decreed good prize.

The Adeline, 9 *Cranch*, 244.
The Harrison, 1 *Wheaton*, 298.
The Staat Embden, 1 *C. Rob.*, 26, 29.
3 *Greenleaf on Evidence*, § 443.

In reality the whole cargo was destined for Pagés, as the claimants admit, and would have been delivered to him at Havana (p. 18).

Neither bill of exchange contained any provision which could be interpreted as an assignment of the goods to the acceptor. If such had been the case the attempted assignment would have been invalid for want of a delivery of the goods. The bill drawn by Gibernau & Company named Kleinwort Sons and Company, the claimants, as acceptors and directed them to charge the amount to the account of "*Pedro Pagés of Havana, as per advice.*" The bill drawn by Maristany also named the claimants as acceptors, and directed them to charge its amount to "*the account of P. Roses Valenti of Barcelona, as per advice.*" In each case the acceptor was to look to the payee for payment, in the first instance, then to the other parties to the bill and not to any specific thing which had been given as security. It is alleged by Harcke that when the bills of exchange were presented to the claimants for acceptance they were accompanied by the bills of lading and invoices covering the whole cargo. The claimants contend that the possession of the bills of lading carried with it the ownership of the goods with full power of disposition. They say:

> "The said cargo was ultimately destined for Don Pedro Pagés of Havana, who, in the ordinary course of business, would, by payment to or indemnification of Kleinwort Sons and Company or their agents in that behalf take up the said bills of lading and thus be enabled to take the goods."

They say that with this end in view they forwarded all papers relating to the shipments consigned to Pagés and Gibernau & Company, to Gelak & Company, bankers of Havana, on April 9, 1898. Not only did they fail to show what instructions were given to Gelak & Company with regard to the disposal of the papers, but it appears

that Gelak & Company had not received them on June 9th, and there is nothing tending to show that they did receive them prior to October 4, 1898 (p. 35), or that they had not in the meantime been delivered to Pagés and the other consignees. As to the bill of lading, covering the jerked beef shipped for the account of the *Carlos F. Roses*, the claimants say that it "was not forwarded to Havana at all but was retained by the said Messieurs Kleinwort Sons & Company, pending the disposal of the said cargo" (p. 19). If the claimants had the right to prevent or interfere with the delivery of the cargo, and if they instructed Gelak & Company to retain possession of the bill of lading and invoice pending payment of the bill of exchange by Valenti or Pagés, and if such retention would have prevented the master of the vessel from delivering the cargo to the consignees, the claimants' failure to forward this bill of lading would have been a very peculiar transaction, because it would have left the ship under demurrage at Havana and left the perishable cargo to deteriorate, thus working injury to the interests of all concerned. In reality the claimants had no interest at stake in the venture of the voyage and had no concern in the shipments further than that a loss might impair the general responsibility of their debtors.

If the cargo had been delivered at Havana and the claimants, or their agents, had obtained possession of it, they could have acquired no rights superior to those of a bailee. As bailees, they could not have disposed of the goods or exercised other rights of ownership over them until the payees, who were also consignees, had failed to pay the bills. Thus, the claimants' right to the goods would have been contingent upon the happening of something which could not occur until the voyage was completed. The capture in-

tervening, the claimants never became bailees of the goods and never obtained any title to them.

Facts of like legal effect have been presented to this court in a number of cases and its decisions therein bear out our argument and conclusions.

In the case of the *Mary and Susan*, 1 *Wheat.* 25, it appeared that during the war of 1812 an American merchantman, bound from Liverpool to New York, was captured by a privateer. In her cargo were certain goods which had been shipped by British subjects. The invoice showed that the goods had been bought in England by Cross & Company, commission merchants, of Birmingham, "by order and for account and risk" of G. & H. Van Wagenen, the claimants, who were citizens of the United States. The goods had not been sent to the claimants by Cross & Company direct, but over a year before their shipment were forwarded to Liverpool in care of a firm of that city, and there stored, pending a cessation of hostilities. When delivered to the vessel the goods were accompanied by an invoice, signed by Cross & Company, in which it was said: "The goods are now the property of Messrs. Spooner, Atwood & Co., bankers, of Birmingham, to whom you will please remit the amount of this invoice." The actual shipment was made by still another Liverpool firm, the goods being consigned to the claimants in New York. With the goods were two letters. One was written by Cross & Company, in which they requested the claimants to remit the amount of the invoice to Atwood & Company, upon the arrival of the goods. The other was written by Atwood & Company, in which they said that the goods had been purchased by Cross & Company for the claimants' account, and were forwarded with the request that the amount of the invoice be remitted to the writers. They also said that Cross &

Company had sustained certain business reverses and that the writers having assisted them with funds had thought it right to obtain an assignment of the goods.

On behalf of the captors, it was admitted that a delivery of the goods by Cross & Company to the vessel would, in contemplation of law, have been a delivery to the claimants, but they contended that Atwood & Company were the shippers, because the goods had been assigned to Atwood & Company, and as there was no privity between the claimants and Atwood & Company they could not have compelled the claimants to accept them. They argued that the goods should be regarded as the property of the shippers and condemned as enemy property.

For the claimants, it was argued that the goods were purchased upon their order by Cross & Company, who retained possession of and title to them until their delivery to the vessel at Liverpool, when they became the claimants' property. Also, that the object of the assignment to Atwood & Company was not to defeat the relations of creditor and debtor subsisting between Cross & Company and the claimants, but merely to enable the bank to receive the amount of the invoice from the claimants: If the assignment had been intended to operate as a sale, it would have been invalid for want of a delivery of the goods to Atwood & Company, and, if intended as an authority to collect the money, the right of property remained in Cross & Company until it passed by delivery to the vessel.

In its opinion, the court said (pp. 39–40):

> "If the goods were shipped in pursuance of orders given by G. & H. Van Wagenen, the delivery on board the ship was a delivery to them; the property was vested in them by that act, and they had no election to accept or reject it.

"In pursuing this inquiry, the legal effect of the transaction must depend, in a considerable degree, on the intent of the parties, and that intent is, in this case, to be collected chiefly from their letters, and from the circumstances in which they stood. G. & H. Van Wagenen were American merchants desirous of receiving the goods they had ordered as soon as the importation of those goods should be allowed. Daniel Cross & Company were commission merchants of Birmingham, engaged in the American business. Spooner, Attwood & Company were bankers, friendly to Daniel Cross & Company; were desirous of promoting their interests, and recommending them to business, and had advanced them money while embarrassed by the difficulties consequent on the state of trade between the United States and Great Britain. Spooner, Attwood & Company were desirous, not of purchasing the goods stored at Liverpool by Cross & Company for the claimants; nor of interrupting the shipment of those goods, or the connection between Daniel Cross & Company and G. & H. Van Wagenen, but of permitting the shipment to proceed, and of receiving, themselves, the money to which Cross & Company were entitled. Such was the situation, and such the objects of all the parties."

Considering the evinence, the court said of Cross & Company's letter which accompanied the shipment (p. 41):

"This is the letter of an agent who has executed, completely, the order which had been given him; but who, having been compelled to borrow money, had transferred his pecuniary claims to his creditor."

Of the letter of Atwood & Company, it was said (p. 42):

"Nothing is said in this letter respecting the vessel by which the goods were sent; nothing indicating the exercise of any judgment by Spooner, Attwood &

> Co., respecting the time or manner of sending them; nor anything which would lead to the opinion that they interfered in any manner whatever in the transaction of the business."

Of the assignment by Cross & Company to Atwood & Company, it was said (p. 42):

> "Whatever may have been the form of this assignment, it is apparent that it could not have been made, and certainly was not made, with the intention of enabling Spooner, Attwood & Co. to defeat the shipment to G. and H. Van Wagenen, or to control the proceedings of Daniel Cross & Co. under the order they had received."

The court's view of the case upon all of the evidence is stated thus (p. 44):

> "The effect of the transaction is precisely the same as if they [Cross & Co.] had drawn a bill in favor of Spooner, Attwood & Co. for the amount of the invoice. It is said that the assignment gave Spooner, Atwood & Co. an election to ship the goods, or to dispose of them otherwise, and that the necessary consequence of this power of election is a correspondent right of election in G. and H. Van Wagenen to receive or reject them. The court does not view the transaction in this light. The assignment to Spooner, Atwood & Co. is understood by the court, from the evidence furnished by the letters, and the circumstances and objects of the parties, to have been subject to the right of Daniel Cross & Co. to execute completely, the order of the claimants. The interest of all parties were best promoted by pursuing this course, and they appear to have pursued it. The court perceives nothing which can justify the opinion that Spooner, Attwood & Co. had a right, or would have been permitted to intercept the shipment. Certainly it was neither their wish nor their interest to interrupt it.

> It is not reasonable, therefore, to suppose that they would have created any difficulty in obtaining a right to claim the amount of the invoice from G. and H. Van Wagenen by insisting on such an assignment as Daniel Cross & Co. would have been unwilling to make because it might have proved injurious to them without benefiting the house they meant to secure."

Thereupon the court affirmed the decree of the Circuit Court of the United States, by which the restitution of the cargo to the claimants had been ordered.

In the case at bar, it appears as clearly as in that of the *Mary & Susan* that the goods shipped were purchased by commission merchants in fulfillment of orders received from the consignees, who became the owners of and bound to accept the goods from the moment of their delivery to the vessel. All of the cargo was intended to be delivered to Pagés, whose business establishment at Havana would enable him to sell it at large prices to the needy citizens of that place. Such a course would promote, and any other would defeat, the interests of every one concerned. Kleinwort Sons & Company did not wish to purchase the jerked beef and garlic. They were a banking house, without facilities for dealing in food supplies, and accepted the bills of exchange for the discount which they charged upon them. It is not shown that they instructed Gelak & Company to retain the bills of lading until the bills of exchange had been taken up by Pagés. Evidently there was some special, undisclosed understanding between them and the other parties, with regard to the delivery of the goods, for they were of a perishable nature and, as we have already seen, the bill of lading covering the vessel's share of the jerked beef was never forwarded to Havana, although the bill covering

the rest of the cargo is said to have been sent to Gelak & Company on April 9th. The claimants say that they retained the former bill "pending the *disposal* of the said cargo" (p. 19). It is clear that they did not intend—even if they could—to control or delay its delivery to Pagés.

If the shipment by the *Mary & Susan* became the property of the consignees by delivery to the vessel, and, therefore, at the time of capture, was not condemnable as prize, because the consignees were citizens of the United States; in like manner the cargo of the *Carlos F. Roses* became the property of the consignees, who were Spanish subjects, and at the time of capture was condemnable as enemy property.

In the case of *The Francis*, 8 *Cr.* 418 (1814), a New York merchant claimed two shipments of goods which had been captured on board the vessel. They were condemned by the prize court as enemy property. On appeal the claimant asked leave to take further proofs, alleging: that one shipment was consigned to him by British subjects, in consequence of an advance made to them by the claimant, in consideration of the consignment; and, that the other shipment was made in virtue of a general balance due the claimant from the shippers. Both consignments were at the risk of the shippers.

The court said (p. 419):

> "To establish these claims in point of fact an order for further proof is asked for and the question is whether if proved the claim can, in point of law, be sustained.
>
> "The doctrine of liens seems to depend chiefly upon the rules of jurisprudence established in different countries. There is no doubt but that, agreeably to the principles of the common law of England,

a factor has a lien upon the goods of his principal in his possession for the balance of account due to him; and so has a consignee for advances made by him to the consignor. . . But this doctrine is unknown in prize courts, unless in very peculiar cases, where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties. Such is the case of freight upon enemies' goods seized in the vessel of a friend, which is always decreed to the owner of the vessel. . . But in cases of liens created by the mere private contract of individuals, depending upon the different laws of different countries, the difficulties which an examination of such claims would impose upon the captors, and even upon the prize courts, in deciding upon them, and the door which such a doctrine would open to collusion between the enemy owners of the property and neutral claimants, have excluded such cases from the consideration of those courts. . . The principal strength of the argument in favor of the claimant in this case seemed to be rested upon the position that the consignor in this case could not have countermanded the consignment after delivery of the goods to the master of the vessel, and hence it was inferred that the captor had no right to intercept the passage of the property to the consignee. This doctrine would be well founded if the goods had been sent to the claimant upon his account and risk, except in the case of insolvency, but when goods are sent upon the account and risk of the shipper the delivery to the master is a delivery to him as agent of the shipper, not of the consignee, and it is competent to the consignor at any time before actual delivery to the consignee to countermand it and thus prevent his lien from attaching. Upon the whole, the court is of opinion that, upon the reason of the case, as well as upon authority, this claim cannot be supported, and the sentence of the court below must be affirmed with costs."

The case at bar presents still stronger grounds for a decree of condemnation because the consignments were not made at the risk of the shipper, but "for account and risk and by order" of the consignees named.

The decisions of British prize courts are in accord with the foregoing authorities.

The Tobago, 5 *Rob.* 218. Here a claim to a captured French vessel was made on behalf of a British merchant, alleging that he was the holder of a bottomry bond which had been executed and delivered to him by the master of the ship before the commencement of hostilities between Great Britain and France. The court said:

> "The integrity of this transaction is not impeached, but I am called upon to consider whether the court can, consistently with the principles of law that govern its practice, afford relief. It is the case of a bottomry bond, given fairly in times of peace, without any view of infringing the rights of war, to relieve a ship in distress. . . Can the Court recognize bonds of this kind as titles of property, so as to give persons a right to stand in judgment, and demand restitution of such interests in a court of prize? . . . The person advancing money on bonds of this nature acquires, by that act, no property in the vessel; he acquires the *jus in rem*, but not the *jus in re*, until it has been converted and appropriated by the final process of a court of justice. . . It is said that the captor takes *cum onere*, and, therefore, that this obligation would devolve upon him. That he is held to take *cum onere* is undoubtedly true, as a rule which is to be understood to apply where the onus is immediately and visibly incumbent upon it. A captor who takes the cargo of an enemy on board the ship of a friend takes it liable to the freight due to the owner of the ship; because the owner of the ship has the cargo in his possession. . . But it is a proposition of

a much wider extent, which affirms that a mere right of action is entitled to the same favorable consideration in its transfer from a neutral to a captor. . . Claims of such a nature. . . are private contracts, passing between parties who may have an interest in colluding; the captor has no access whatever to the original private understanding of the parties in forming such contracts; and it is therefore unfit that he should be affected by them. His rights of capture act upon the property, without regard to secret liens possessed by third parties. . . I am of opinion that there is no instance in which courts have recognized bonds of this kind as titles of property, and that they are not entitled to be recognized as such in the prize court."

The Marianna, 6 *Rob.* 24. The vendors of this vessel, who were citizens of the United States and neutrals, made claim to her cargo, which had been shipped by the purchaser, a Spanish merchant at Buenos Ayres, and consigned to the agents of the claimants at London. It was alleged that the proceeds of the sale of the cargo were to be received by the claimants and applied as part payment of the purchase money of the vessel. The claim was disallowed because the claimants' interest was not sufficient to support their claim of property. The court said:

"Captors are supposed to lay their hands on the gross tangible property, on which there may be many just claims outstanding, between other parties, which can have no operation as to them. If such a rule did not exist, it would be quite impossible for captors to know upon what grounds they were proceeding to make any seizure. The fairest and most credible documents, declaring the property to belong to the enemy, would only serve to mislead them, if such documents were liable to be overruled by liens which could not in any manner come to their knowledge. It would be equally impossible for the court, which

has to decide upon the question of property, to admit such considerations. The doctrine of liens depends very much on the particular rules of jurisprudence which prevail in different countries. To decide judicially on such claims, would require of the court a perfect knowledge of the law of covenant, and the application of that law in all countries, under all the diversities in which that law exists. From necessity, therefore, the court would be obliged to shut the door against such discussions and to decide on the simple title of property, with scarcely any exceptions. . . . As to the title of property in the goods, which are said to have been going as the funds out of which the payment for the ship was to have been made. That they were going for the payment of a debt will not alter the property. There must be something more. Even if bills of lading are delivered, that circumstance will not be sufficient unless accompanied with an understanding that he who holds the bill of lading is to bear the risk of the goods as to the voyage and as to the market to which they are consigned; otherwise, though the security may avail *pro tanto*, it cannot be held to work any change in the property."

The Ida, Spinks' Prize Cases, 26. A claim was made by a neutral merchant to a cargo of coffee which had been consigned to him by an enemy on the credit of certain advances. Bills of lading covering the cargo had been delivered to him as security for the payment of such advances. The court declined to recognize the claimants' lien and condemned the cargo as enemy property.

II.

The Bills of Exchange could not have operated as a Transfer of the Cargo because it was In Transitu.

Both bills of exchange bear date after the goods were delivered to the vessel. The bills of lading had been

issued, and the goods were *in transitu*. A transfer then attempted to be made by the Spanish consignees to the British claimants would have been void.

The Sally Magee, 3 *Wall.* 451. This vessel was owned by residents of Richmond and, prior to the War of the Rebellion, had been engaged in the South American trade. Early in 1861 she sailed from Richmond for Rio de Janeiro with a cargo which was delivered at the latter port. On May 12th, before news of the outbreak of hostilities had reached Rio, and before the ship could have received any notice of it, she sailed on her return voyage. In her cargo was a shipment of coffee which had been made by Coleman & Company, commission merchants at Rio, a firm composed of British subjects. It was consigned to Dunlop, Moncure & Company, of Richmond. While on her voyage to Richmond the vessel was captured by a United States cruiser and sent in for adjudication. She and her cargo were condemned as enemy property. Coleman & Company, who had made claim to the shipment, alleging that they had a lien upon it and hence that it was neutral property and not subject to condemnation, took an appeal to this court. Mr. Justice Swayne, delivering the opinion, said (pp. 459, 460):

> "The other claim relates to the coffee consigned to Dunlop, Moncure & Company of Richmond, and it is not denied that this was enemy property. The claimants allege a lien. The claim states that Dunlop, Moncure & Company owed them a balance of upwards of $35,326, and that they were authorized and directed by that firm to receive and sell the coffee and apply the proceeds, as far as possible, to the payment of the debt and to hold the balance for the account of the debtor firm. . . . It is to be inferred also that the letters [conveying the alleged authority] were written after the shipment of the cargo and

indeed after the capture. In either case the arrangement was made too late to have any effect. The ownership of property in such cases cannot be changed while *in transitu*. The capture clothes the captors with all the rights of the owner which subsisted at the commencement of the voyage, and anything done thereafter designed to encumber the property or change its ownership is a nullity. No lien created at any time by the secret convention of the parties is recognized. Sound public policy and the right administration of justice forbid it. This rule is rigidly enforced by all prize tribunals. The property was shipped to the enemy. It was diverted from its course by the capture. The allegation of a lien wears the appearance of an afterthought. It strikes us as a scheme devised under pressure to save if possible something from the vortex which it was foreseen inevitably awaited the vessel and cargo."

The Sally, 3 *Rob.* 300, *note* 3. During war between Great Britain and France a cargo of corn was shipped in an American vessel by a Baltimore firm, ostensibly for the account and risk of a Philadelphia firm, to whom it was consigned. An endorsement on the bill of lading provided that the vessel should proceed to Havre and there await the orders of the consignee, either to deliver the cargo at Havre or at any port without the Mediterranean. Among the papers was a letter from the French Minister at Washington to the French Minister of Foreign Affairs, in which he said that the Philadelphia firm had been ordered by him to procure provisions which were to be sent as American property to Havre. Another letter from the same official to the Mayor of Havre informed him that "Our government having ordered me to send supplies of provisions to your port, I inform you that the bearer of this, commanding the American ship *The Sally*, is laden with a cargo of wheat, of which he will deliver

you the bill of lading." The vessel was captured and the nominal consignees—the Philadelphia firm—made claim to the cargo. The court said:

> "It has always been the rule of the prize courts that property going to be delivered in the enemy's country, and under a contract to become the property of the enemy immediately on arrival, if taken *in transitu*, is to be considered as enemy's property."

Some additional light is thrown upon the present case by the circumstances under which the voyage of the *Carlos F. Roses* was made and her cargo was shipped. The Cuban insurrection had been in progress for upwards of three years. The Spanish troops, and people of the island who remained loyal to Spain and continued to reside in Havana, were in dire need of food. When the vessel sailed from Montevideo the United States and Spain were on the eve of war. All of the things which led the United States to acknowledge and demand from Spain the independence of Cuba had transpired. In the words of Congress:

> ". . . the abhorrent conditions which have existed for more than three years in the Island of Cuba, so near our own borders, have shocked the moral sense of the people of the United States, have been a disgrace to Christian civilization, culminating as they have in the destruction of a United States battleship with two hundred and sixty-six of its officers and crew while on a friendly visit to the harbor of Havana, and cannot longer be endured." (30 Stat. L. 738.)

Foreign nations, including Spain, were before us in appreciating that war was inevitable. Through several

cases, already adjudicated, it is known to this court that Spanish ships which sailed from foreign and neutral ports during March of 1898, were insured against the risks of war. It must have been evident to every one that, as the first act of hostility, the United States would establish a blockade of Havana and other Cuban ports. Merchants throughout the world knew that commodities of all kinds were bringing exorbitant prices in Havana and that few more cargoes could be delivered. Pagés appreciated the desirability of getting in a large cargo of food supplies and had thought it best to place his order in a foreign state, rather than in the United States. The owners of the vessel appreciated that an opportunity was offered which, although it involved some risk, yet promised an opportunity for getting large profits. The value of the ship was small. Her share of profit, had she succeeded in delivering the cargo, would have more than equalled her value. The shippers, too, appreciated the opportunity. Hence the anxiety of these three parties to join in the venture of a voyage. The bills of exchange issued by the shippers and the master were not presented to the claimants for acceptance until April 6th, only two weeks prior to the outbreak of war. They made no attempt to assert the ownership of the goods, or prevent their delivery at Havana. They retained one of the bills of lading, presumably with the idea of permitting the delivery of the cargo to the consignees, if all things went well; but of claiming to own it in case war intervened and the ship were captured by the United States.

There can be no doubt that it was the duty of the *New York* to make the capture and send in the *Carlos F. Roses* and her cargo for adjudication. The vessel was enemy property beyond a peradventure. The cargo bore every evidence of being what it in reality was—enemy property.

The delivery of the cargo was of the highest importance to the enemy, and its delivery at a blockaded port, the head center of Spanish dominion in the West Indies, was prevented only by capture.

We submit that the decree of the court below should be reversed.

HENRY M. HOYT,
Assistant Atty. General,
For the United States.

JOS. K. McCAMMON,
JAMES H. HAYDEN,
Of Counsel for Captors

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE UNITED STATES, APPELLANT,
v.
KLEINWORT SONS & Co., CLAIMANTS of the cargo of the Spanish bark "Carlos F. Roses." } No. 243.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AND THE CAPTORS.

It is understood that in purchases and shipments of goods upon bills of lading which are attached to bills of exchange drawn against them the bill of exchange is drawn upon the consignee and purchaser and is sent forward for collection by the bank in the territory of shipment, which cashes the draft through the ordinary domestic channels or by sale in the foreign exchange market. The seller of the goods (whether or not also the consignee's agent to purchase and the shipper) and the

bank which cashes the draft are thus recouped, though liable over to their indorsees upon default by the party ultimately chargeable, unless the transfer or sale is without recourse. It is also understood that in cotton shipments of this character to foreign points—as, for instance, interior English or German manufacturing towns—the ultimate owner of the goods, the merchant or manufacturer, is often the drawee. It is also no doubt true that a bank or bankers at the interior point or at the general exchange center, such as London, or Bremen, or Berlin, is frequently the drawee of the bill of exchange instead of the consignee and real owner. But this ordinarily means, as we understand it, that the real owner, the customer of the drawee bank, has an arrangement with the latter, upon some special contract or upon a general running account by the deposit of funds or the pledge of other security or upon personal liability, in consideration of which the banker consents to stand in the owner's place and pay the draft and discharge the obligation through the chain of indorsees. That is to say, the banker who thus places himself in the position of drawee has not only his recourse against the goods of the particular shipment, but also against his customer who has ordered the goods and owns them and who is bound to make good, under the agreement and dealings between them, any loss or deficiency that may result. And it is obviously the fact that usually there is no question of sale of the goods and payment thereout; but the draft, when it comes in and is paid, is charged on the bank's books to the customer's account. The banker has control of the goods, but they do not constitute his only hold on his merchant

customer. And the final holder is not merely an agent to collect and remit the advances, who holds the bills until the draft is taken up; but himself pays the draft (or by acceptance becomes liable to do so), and nevertheless forthwith delivers the documents, charging his customer's deposit account or running credit on a demand or time basis, as the case may be.

The payment of a debt owed by the resident of one part of the country in another part by the ordinary domestic bill of exchange or bank draft on the central exchange city, such as New York, not involving the feature of the bill of lading, does not appear to be analogous. The banker in the former case bears a peculiar relation, both to the real owner and to the shipper, in a course of dealing which has grown up by trade usage and for commercial convenience. The banker in the latter case is the drawee of an ordinary check against funds on deposit.

This being the general commercial situation in such transactions, and the position of the bankers who are claimants here, what rules as to their title should be applied to them in a prize court?

We do not deny that there is little or nothing to impeach the transaction on its face; that is to say, little or nothing to impeach the claim of *bona fide* purchase, for the invoice showing of enemy ownership does not necessarily show any circumstances of fraud or unfairness. The allegations of the claim need not be regarded as evasive or essentially inconsistent, it is true. The claimants say they are wholly unindemnified except by the insurance. While they do not say that they instructed

their Habana agents not to deliver the goods until payment, they no doubt mean to imply as much when they say that in the ordinary course these agents would have held the bills of lading until payment had been made or security given. But if bills of lading are not negotiable, in the full sense of bills of exchange, and if the real intent of the parties and the real nature of the transactions may be shown under certain circumstances, notwithstanding the prepossessions in favor of a purchaser for value, and especially may be shown as between the banker and the consignee and real owner, the actual facts may consequently be shown here consistently with the ordinary commercial rule; for the captors necessarily claim as succeeding to the real owner's rights, and while they so succeed under an adverse claim, undoubtedly they could have adduced evidence (provided they were able to find it) upon the nature of this transaction and the relations of the parties, if further proof had been allowed to them.

But the reply may be made to this that even if all the foregoing were true, further proof was not allowed to the captors and nothing has been shown to defeat the claimants' rights or to establish a different situation from that alleged by them except general suspicions inferred from the statements of the affidavits and the documents, particularly as to the ultimate enemy ownership. And as to the latter feature it is said that an invoice is not one of the significant documents, so far as the contract of shipment and the title by indorsement and delivery of the bills of lading are concerned.

If, however, this view is sustained, what then becomes

of the ordinary rule in prize? Is it necessary that the captors should show circumstances of fraud or unfairness appearing in the transaction? Is it not rather necessary that the claimant should show the absence of anything to impeach the transaction and the nonexistence of collusion or neutral cover to an enemy interest by disclosing fully all the facts and relations, with the correspondence concerning the order to purchase, to accept the drafts, to deliver the goods or withhold delivery? Should not these things be shown fully and positively, so that the antecedent, accompanying, and consequent facts or dealings may all be known? And if such proof is not made, does the neutral claimant meet the burden of proof? And has he not been astute to keep the court from being apprised of circumstances which, if produced, might have been disastrous to the cause of the producent? We read all the cases as establishing beyond doubt that a neutral claim of this nature must be established beyond meager statement, bare allegations, and a simple *ex parte* attestation. So strictly has this rule been enforced that Lord Stowell, in the case of the *Rosalie and Betty*, cited in the additional brief for the Government and captors, would not allow the claimants a second opportunity for further proof, although they were anxious to fortify and enlarge their evidence, their showing under the proof offered being sparse and merely formal.

We think the principles which we thus invoke are fully sustained by the cases which we cite, both on the general commercial doctrine as to transfer by indorsement of a bill of lading and on the rule in prize; but we

beg leave, in conclusion, to submit to the court a brief discussion on two of the cases cited which may be regarded as typical of the general rule and the prize rule.

In the case of *Conard* v. *Atlantic Ins. Co.* (1 Pet., 292) there was an advance by insurers to a merchant engaged in the China trade upon the security of bills of lading of an outward cargo shipped from this country to China and upon the security also of the return proceeds of the cargo in specie, which came back under bills of lading. The security of the bankers was held to be valid against a levy on behalf of the Government on a judgment for duties, and the court in the course of the opinion reviewed carefully and distinguished the previous case of *Thelluson* v. *Smith* (2 Wheat., 396), which was a case from Pennsylvania, and decided that the lien of a judgment on land was not prior to a subsequent levy in favor of the Government, because the lien had not been perfected by the issue of execution before the Government levy was made. An effort was made in the case of *Conard* v. *Atlantic Insurance Co.* as well as in the case of *Thelluson* v. *Smith* to establish the Government right of priority in any such case under the statutes which declare that in case of insolvency or of the indebtedness of a decedent's estate, where the assets are insufficient to pay all the debts due, the debt of the United States shall be first satisfied; and the decision was that the right of the United States under those statutes was not a right which supersedes and overrules the assignment of the debtor as to any property which the United States may afterwards elect to take in execution, but was a mere right of prior payment out of the general fund of the debtor in the hands of the assign-

ces. This feature of the Conard case is pointed out, because here, too, a sovereign right of the United States is involved, which, however, is not limited by statute, but is broad and complete; which does not need statutory authority and is more than a preference, because under prize decisions applicable to the facts here the sovereign right overrides and extinguishes the adverse lien.

But what was the ground upon which the court decided in the Conard case that the title of the transferee of the bills of lading was valid against the Government levy for taxes? The contention of the United States was that the debtor remained owner of the goods and their proceeds through the entire voyage; that at most the insurance company had but a lien for the security of their debt, which was displaced by the priority of the United States and must yield to their superior privilege. But the court said (in effect) that the debtor had full power, notwithstanding a consignment to his agent in China and the return consignment of the proceeds to order in blank, and indorsed in blank by the shipper (an attorney for said agent in China), to pass the title to the property in the bill of lading by a suitable instrument of assignment and sale, which was good against anybody but a purchaser without notice from his consignee; that the language of the indorsement was that of a complete and express assignment with sufficient words of grant and with recital of the facts, and that this complete title was not cut down to a mere lien or equity by the language of the accompanying memorandum, which stated that the bills of lading should be indorsed to the insurance company as collateral security for the outward cargo, and

that the bills of lading for the proceeds to be shipped homeward for account and risk of the borrowers should also be indorsed in blank and delivered to the insurance company as a continuation of the security.

From the foregoing case we argue that in an ordinary commercial transaction and civil suit the title of the bankers here would not necessarily be good against a subsequent lien in favor of the Government, because although the memorandum in the Conard Case showed that the shipments were at the risk of the debtor (as the invoice shows the risk here to be the enemy owner's), yet the transfer on the bill of lading was so complete, express, and absolute that title plainly passed. The form of transfer in the Conard Case was much more than the mere indorsement shown in the case at bar.

And now take the case of *The Merrimack* (8 Cr., 317) as typical of the prize rule. In that case goods were consigned to the British consignor's agent, an American citizen, but the bill of parcels or invoice was in the name of the American merchants for whom the purchase was made, and the shipment was said to be on their account, although private letters of the consignors refer to the property as British. The decision regards as unfavorable to the claimants evidence that the direct consignee, the agent of the British merchants, had such control over the goods that he could have refused to deliver them to the American purchasers, and also statements in the correspondence tending to acknowledge the property to be British; but found it a circumstance favorable to the claim that the original bill of parcels was made directly to the claimant and was sent along with the shipments as

a substitute for an invoice. And since the correspondence showed that the bills of lading were sent to the consignee, yet not to his own use, but to the use of the claimants, and because the bill of parcels or invoice was made out to the claimants, which gave them the right to demand the goods of the consignee, a decree of restitution was affirmed. It will be noticed that the invoice showing had great weight in this result.

Justice Story was unable to concur, on the ground that while the bill of lading purports that the goods are shipped on account and risk of the consignee, confidential letters explain the transaction and show that the shipment was so made as a cover against belligerent risks, and that the legal property and possession thereof still remained in the shippers; and if the consignee had come into possession of the goods his possession would have been but a continuation of the possession of the shipper.

> If they had been lost during the voyage, the loss would have been his. * * * At the time of the shipment and capture it was, in my view, enemy property liable to condemnation, having no American or neutral *onus* attached to it. * * * The right of capture acts upon the proprietary interest of the thing captured at the time of capture. It is not affected by the secret liens or private engagements of the parties. It repudiates even the strong claim of a bottomry bond, because it is not a *jus in re*. Can, then, a mere possibility be of more consideration in a court of prize? The absence of all authority to this effect and the strong and emphatic language of all the cases as to secret liens speak as powerfully as the most direct and pointed decisions against it.

It will be noticed also that there was no doubt that the British shippers were not mere agents to purchase; they were the manufacturers and owners of the goods, and that the claimants produced the private correspondence, although it told against them and was the basis of Justice Story's dissent.

As to another claim in the case for goods so purchased—that is, before the war—it was held that, although the accompanying invoices, bills of lading, and letters are addressed by the British consignors to the American citizens for whom the purchase was made, and all concur to show the property to be in them, yet if these documents are inclosed in a letter from the shippers and consignors to their agent in the United States, directing him not to deliver the goods in case of the existence of certain circumstances, nor until he had received payment of the consignees, the property continued in the British owners and was properly condemned. Restitution was granted on a third claim because the shipping documents and a letter showed in the clearest manner that the property was purchased and shipped for the American claimants, on their order and at their risk, and that the consignment to the agent of the British merchants (an American citizen) was accounted for.

Thus it is seen that in all these claims the real ownership appeared in various ways and was submitted to the court and was decisive of the question. The invoice was regarded as a very significant document, and whether the goods were restored or condemned, the decision rested not so much on what the shipping papers showed, ~~but~~ as

upon the real interest disclosed and upon the confidential correspondence and orders offered in proof.

Therefore we respectfully submit that if the claimants in the case at bar were *bona fide* purchasers for value, and were wholly unindemnified except by the insurance, which may have been placed, for all the claim shows, by enemy underwriters, this is at best a *prima facie* case, fairly open to suspicion, because the enemy ownership appears on the invoice and because the shipment was made *imminente bello;* and the claimants should have established the *bona fides* of their claim by offering, under the burden of proof cast upon them, the fullest information about the entire transaction—the correspondence and orders involved—and can not justly succeed upon their bare attestation that they are purchasers for value.

HENRY M. HOYT,
Assistant Attorney-General.

JOS. K. MCCAMMON,
JAMES H. HAYDEN,
Of Counsel for Captors.

No. 243.

Add'l Br. of Atty Gen. (Knox, McCammon & Hayden) for U.S.

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In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE UNITED STATES, APPELLANT,
v.
KLEINWORT, SONS & CO., CLAIMANTS of the cargo of the Spanish bark *Carlos F. Roses.*
No. 243.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

SUGGESTION ON BEHALF OF THE UNITED STATES OF TWO ADDITIONAL AUTHORITIES.

The United States, with the consent of counsel for the claimants, and for the further information of the court, submits the following two additional authorities, discovered since the argument, on the proposition that capture as prize of war *jure belli* overrides all previous liens:

The *Hampton*, 5 Wall., 372;

The *Battle*, 6 Wall., 498.

In these two cases liens on the vessel alone were involved, but the language of the decisions is general, and in the decision in the *Hampton* case the doctrine is specifically extended and applied to cargoes.

HENRY M. HOYT,
Assistant Attorney-General,
for the United States.

JOS. K. MCCAMMON,
JAMES H. HAYDEN,
Of Counsel for Captors.

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No. 243.

Brief of Mynderse for Appellee

Supreme Court of the United States.

Filed Jan. 11, 1900.

No. 243.

THE UNITED STATES OF AMERICA,

Libellants and Appellants,

against

KLEINWORT SONS & CO., CLAIMANTS OF CARGO OF THE CARLOS F. ROSES,

Respondents.

Brief for Claimants.

WILHELMUS MYNDERSE,

Advocate.

Supreme Court of the United States.

THE UNITED STATES OF AMERICA, *Appellants,* *against* KLEINWORT SONS & COMPANY, CLAIMANTS OF THE CARGO OF THE SPANISH BARK CARLOS F. ROSES.	October Term, 1899. No. 243.

BRIEF FOR CLAIMANTS AND RESPONDENTS.

This appeal runs from a decree of the District Court of the United States for the Southern District of Florida, bearing date February 8, 1899, decreeing that Kleinwort Sons & Company have, receive and recover the proceeds of the sale of the cargo of the bark *Carlos F. Roses*, after the payment of costs and expenses necessarily incurred in the care, custody, preservation and sale of such property (*Decree, pp.* 13, 14).

The libel was filed May 20, 1898, praying condemnation of the *Carlos F. Roses* and her cargo, as prize of war (*Libel, p.* 1), and on the same day process issued against the *Carlos F. Roses* and her cargo, then lying in the port of Key West, Florida, and both interests were duly seized by the marshal (*Monition and Return, pp.* 2, 3). Such process was returnable June 6.

The *Carlos F. Roses* was a Spanish bark of 499 tons, hailing from Barcelona, Spain, and carrying a crew of fourteen men, all Spaniards (*Dep. in Prep., Ans. to 4th and 5th Ints., p.* 7). She had been owned for many years by P. Roses Valenti, a citizen of Barcelona (*Dep. in Prep., Ans. to 9th Int., p.* 8). At the time of her capture she was on a voyage from Montevideo to Havana, Cuba, with a

cargo consisting of about 6,000 quintals (275,640 kilos) of jerked beef and about 19,800 bunches of garlic (*Dep. in Prep., Ans. to 7th and 8th Ints., p.* 8).

The capture was effected May 17 by the cruiser *New York*, when the bark, in pursuit of her voyage, was entering the Old Bahama Channel, off Punta de Maternillos, Cuba, about three hundred and twenty miles from her destination (*Libel, p.* 1; *Deps. in Prep., Ans. to 3d Int., p.* 7).

No defense was entered on behalf of the vessel, and a decree for her condemnation and sale was accordingly made June 2, four days before the return of process (*Decree, p.* 12).

A claim to the cargo, however, had been filed on May 31st, by Herman Greverus Kleinwort and Alexander Drake Kleinwort, composing the copartnership firm of Kleinwort Sons & Company, of London, England, together with a test affidavit (*Claim and Test Afft., pp.* 10, 11).

By the same decree which condemned the vessel time was allowed to the claimants of the cargo to present further proof of their ownership of the cargo (*Decree, p.* 12). Properly speaking, the decree granted an extension of time for original proofs, rather than an opportunity for "further proofs" in the technical sense of that term.

Under this authority for further proof three affidavits were presented in the District Court, all made by Charles Frederick Harcke, manager of Kleinwort Sons & Company, the claimants. These affidavits are dated respectively September 27, 1898; October 12, 1898, and October 31, 1898 (*Record, pp.* 17, 30, 35).

The original claim and test affidavit were made on behalf of Kleinwort Sons & Company by William H. Fain, claiming to be "specially authorized to act for and on behalf of" the same firm (*Record, pp.* 10, 11).

The general grounds upon which Messrs. Kleinwort Sons & Company rest their claim are set forth with substantial accuracy in the original test affidavit, to wit:

> "In the months of February and March, 1898, "the said bark *Carlos F. Roses*, being then in "Montevideo, bound on a voyage to Havana, Cuba, "took on board a cargo of jerked beef and strings

" of garlic shipped by Pla Gibernau & Company, of " Montevideo, to be transported to the said port of " Havana, there to be delivered to the order of the " shippers according to the conditions of certain " bills of lading issued therefor by the said bark to " the said Pla Gibernau & Company."

" Deponent further says, upon information and " belief, that the said shippers, Pla Gibernau & " Company, are merchants domiciled in, and citi- " zens of the Argentine Republic (Uruguay).

" Deponent further says that, being laden with " the cargo aforesaid, the said bark set sail from " Montevideo on the 16th day of March, 1898, " and proceeded upon her voyage to Havana until " the 17th of May, when she had reached a point " in the Bahama Channel off Martinique (Maternil- " los), at which time and place she was captured " by the United States cruiser *New York*, without " resistance on the part of the said bark, and there- " upon the said cruiser *New York* put on board the " said bark a prize master and crew, who brought " the said bark into this port of Key West, where " she and her cargo have been libeled as prize of " war.

" Deponent further says, upon information and " belief that upon and after the shipment of the " said cargo in Montevideo the claimants, copart- " ners as aforesaid, long prior to the capture of the " said bark and her cargo, made advances to the " shippers and owners of said cargo in the sum of " £6,297 British sterling, to wit, £2,714, item thereof, " upon the security of the said lot of 110,256 kilos " of jerked beef and 19,980 strings of garlic, " and £3,583, item thereof, upon the security " of the said lot of 165,384 kilos of jerked " beef; that at the time of making said advances " and in consideration of such advances, the " said bills of lading covering said shipments " were delivered to the claimants, duly endorsed " in blank with the intent and purpose that they " should thereby take the title to said bills of lading " and to the said shipments of jerked beef and gar- " lic, and should, upon arrival of the said vessel at " destination, take delivery of said shipments and " hold the same as security for their said advances " until paid, with full right to receive and possess " and dispose of the said shipments and to apply " the proceeds to the payment of their said ad- " vances; and accordingly the said Kleinwort Sons &

"Company did become and ever since have been "and still are as aforesaid the true and lawful own- "ers of the said bills of lading and of the shipments "of jerked beef and garlic therein referred to.

"Deponent further says that the said advances "so as aforesaid made by the claimants in the "amount of £6,297 British sterling were substan- "tially in the estimated value of the said ship- "ments and much in excess of their actual value "in this port, and that the said sum is equivalent "in money of the United States to about $30,- "633.35, and that no part of the same has been "paid or otherwise secured to be paid" (*Test Affi.*, *p.* 11).

In verifying the test affidavit the deponent added:

"This affidavit is made by him upon informa- "tion transmitted by cablegram, and it is neces- "sarily incomplete, and he prays leave, therefore, "to supplement the same hereafter as justice may "require" (*Test Affi.*, *p.* 11).

The three affidavits of Mr. Harcke served chiefly to produce and identify the documents of the case. He was the manager of the office of the claimants in London.

In his first affidavit, verified at the United States Consulate in London, September 27, 1898, he produces the original bill of exchange for £2,714/13/8, drawn by Pla Gibernau & Company to the order of the London and River Plate Bank, Limited, and accepted by Kleinwort Sons & Company April 6, 1898 (*Exh. A*, *p.* 19; *Translation*, *p.* 38).

This bill of exchange was drawn upon the basis of 110,- 256 kilos of the jerked beef and the said 19,980 strings of garlic (*Harcke's Affi.*, *p.* 17).

On the day of the acceptance of the draft complete sets of the bills of lading covering such shipments, together with invoices of the complete cargo, were delivered to Kleinwort Sons & Company, in consideration of their acceptance of the bill of exchange, and as security for their liability thereunder (*Harcke's Affi.*, *pp.* 17, 18).

On April 9, Kleinwort Sons & Company sent the bills of lading and invoices by post to Messrs. N. Gelak

& Company, of Havana, bankers, who were the agents in that city of Kleinwort Sons & Company, who would either receive the cargo there on account of Kleinwort Sons & Company, or would, upon payment being made of the amount of Kleinwort Sons & Company's advances, deliver the bills of lading to Pedro Pages, or his order, for whom the goods were ultimately destined (*Harcke's Afft., p.* 18).

War began April 21, and interrupted mail communication with Havana, so that these documents did not reach Messrs. N. Gelak & Company in due course.

On June 17 a cablegram was sent to them by Kleinwort Sons & Company, requesting the return of the documents, and a reply came by cablegram that the documents had never been received (*Harcke's Afft., p.* 18; *Exh. G, p.* 22; *Translation, p.* 41).

Accordingly, Mr. Harcke annexed to his affidavit copies of the bills of lading, covering the said shipments of 110,256 kilos of jerked beef and 19,980 strings of garlic (*Exhs. H, I, J, K, L, M, N. O, P and Q, pp.* 23–27). These copies do not show the signature of the master, but their correctness as copies is certified to by the shippers.

He also produced copies of the invoices of the entire cargo (*Exhs. R and S, pp.* 28, 29), showing a shipment of 275,640 kilos of jerked beef, sixty per cent. (to wit, 165,384 kilos) being "*a la expedicion*" of the vessel, and forty per cent. (to wit, 110,256 kilos) being for account of Don Pedro Pages of Havana; and a shipment of 19,980 strings of garlic, one-half for account of Pedro Pages, and the other half for account of the shippers.

The original invoice was subsequently produced (*Exhs. Z and AA, pp.* 34, 35; *Translation, pp.* 40, 41).

At the same time Mr. Harcke produced the original bill of exchange for £3,583. drawn by the master of the bark to the order of Pla Gibernau & Company, and endorsed by them to the London and River Plate Bank, Limited, and accepted by Kleinwort Sons & Company, April 6, 1898 (*Ex. B, p.* 20; *Translation, p.* 38).

This bill of exchange was drawn upon the basis of the remaining portion of the shipment of jerked beef, to wit, 165,384 kilos, and in consideration of the acceptance of the

draft by Kleinwort Sons & Company, and as security for the liability so incurred by them, the entire set of bills of lading covering such shipments were delivered to them (*Harcke's Affi.*, *p.* 18). The exact date of such delivery does not appear, but they were delivered pursuant to an agreement for their production, and clearly before the payment of the draft (*Harcke's Affi.*, *p.* 18).

These original bills of lading were not sent out to Havana, although this portion of the cargo was likewise ultimately destined for the same Pedro Pages, the disturbed mail communication with that port having in the meantime become apparent; but they were retained by Kleinwort Sons & Company, and were annexed to Mr. Harcke's affidavit (*Exhs. C, D, E, F, pp.* 20-21; *Translation, pp.* 38, 39).

Mr. Harcke's affidavit shows that subsequently, and on May 9 both bills of exchange were paid by the claimants under their acceptance (*Harcke's Affi.*, *p.* 17), and that no payment whatever has been made to the claimants or to their agents on account thereof through advances from Pedro Pages or from any person on his behalf or otherwise; and that the claimants have been and are wholly unindemnified in respect of their payments, except by the proceeds of the cargo and the insurance thereon, which they have become entitled to collect (*Harcke's Affi.*, *p.* 18).

In Mr. Harcke's second affidavit, verified at the United States Consulate in London, October 12, 1898, he merely produced three of the original bills of lading for the shipment of 110,256 kilos of jerked beef and three of the original bills of lading for the 19,980 strings of garlic, the original invoice for the entire shipment of jerked beef and the original invoice for the shipment of garlic (*Exhs T, U, V, W, X, Y, Z, AA, pp.* 30-35; *Translation, pp.* 39-41).

He stated in his affidavit that the same had been received in London on October 6 from their Havana correspondents N. Gelak & Co., enclosed in a letter dated September 23, without information or explanation as to how or when the same came into the possession of Messrs. N. Gelak & Co.,

> " but they appear to have done so on or about the
> " 17th of September last, on which date they wrote
> " to Messrs. Kleinwort Sons & Company, informing
> " them that the said documents were in their hands "
> (*Harcke's Afft., p.* 30).

At that time some communication with Havana was opened, and the delayed mails of the previous April had apparently just reached there.

Mr. Harcke's third affidavit, verified before the United States Consul October 21, 1898, merely produced the remaining bills of lading for 110,256 kilos of jerked beef and the garlic (*Exhs. C. F. H* 1; *C. F. H* 1; *C. F. H* 3; *Translations, pp.* 39, 40). In this affidavit Mr. Harcke states that these documents were received from N. Gelak & Company under cover of a letter of October 4, and without information as to the manner in which the documents had come into their possession. He adds, however, that none of the documents had in any way been dealt with by Messrs. Kleinwort Sons & Company, except that the same had originally been forwarded by post to their correspondents, N. Gelak & Company (*Harcke's Afft., pp.* 35, 36).

Pending the hearing in the District Court the entire cargo was sold as perishable, and realized, it is asserted, about $12,000, less than one-half of the amount of the claimants' advances.

POINTS.

First.

THE PROOFS PUT FORWARD BY THE CLAIMANTS ARE REGULAR IN FORM AND WERE PROPERLY RECEIVED BY THE DISTRICT COURT.

It is to be observed that the proofs are not of the character technically known in the prize court as " further

proofs," but that they were intended to be and were, in fact, merely supplemental to the original test affidavit, and purely confirmatery thereof.

The original test affidavit was filed May 31, and the deponent thereto stated that the affidavit was made by him

> " upon information transmitted by cablegrams and
> " that it is necessarily incomplete, and he prays
> " leave therefore to supplement the same hereafter
> " as justice may require " (*Test Affi., p.* 11).

Upon the basis of this affidavit, the District Judge, by order entered June 2, *four days before the return of process*, directed that the claimants of the cargo should have sixty days in which to file further proofs of ownership (*Order, pp.* 9-12).

Evidently the proceedings on that day could not have been a trial in respect of the cargo, and were not intended to be. The time allowed by the Court was, by consent of counsel, and the order of the Court, duly extended to and including October 15, within which time Mr. Harcke's first affidavit was duly filed (*Orders, pp.* 12, 13).

The two subsequent affidavits were received by the Court after service upon the counsel for the United States (*see original affidavits on file*), and without objection on the part of the United States.

Thereafter, and on February 2, 1899, the United States, *for the first time*, moved for the condemnation of the cargo of the vessel, thereby treating the affidavits as an enlargement of the original test affidavit, and not as "further proofs" (*Motion. p.* 13).

Even if the affidavits of Mr. Harcke had been technical "further proofs" the rules regulating the presentation of such proofs rested entirely with the Court receiving them. Proof by way of affidavits in a court of original jurisdiction is usual and proper (*Upton's Maritime Warfare, pp.* 428-471).

The practice and rules of the Supreme Court as to the manner of taking further proofs in this Court are not

pertinent. They relate specifically and in terms to an entirely different situation.

Moreover the proofs of the District Court were received and read and considered by the Court upon the trial entirely without objection on the part of the United States or the captors.

After the decree of the District Court an appeal was taken by the United States, and errors were specifically assigned. But in no one of the assignments is there any intimation that proofs were irregularly taken, presented or received (*Assignments of Error, p.* 15).

The Court was properly satisfied with the proofs presented by the claimants, and did not direct any "further proofs" on their part. The technical situation of the trial was such that it would have been entirely proper for the District Judge at that stage to have called upon the claimants to produce further proofs and to have directed, in the discretion of the Court, that such proofs be taken under commission.

Second.

AT THE TIME OF CAPTURE THE CARGO WAS OWNED BY NEUTRALS AND WAS EXEMPT FROM CONDEMNATION, NOT BEING CONTRABAND OF WAR.

While this country has never adopted the Declaration of Paris of 1856, one provision of which protects neutral goods except contraband of war, even under the enemy's flag, the principle of that provision was put into operation during the late war by the second paragraph of President McKinley's proclamation of April 26, 1898, which provided:

> "Second: Neutral goods, not contraband of war,
> " are not liable to confiscation under enemy's flag "

Our Government did not take early action in the matter of defining contraband of war. In his proclamation of

April 26. President McKinley indicated that coal, beyond a vessel's necessary supplies, would be deemed contraband, and otherwise apparently determined to leave the question to the law of nations, or to our particular treaty with any interested nation.

In June, 1898, the Treasury Department issued this circular relative to contraband of war:

"CONTRABAND OF WAR.
"Circular No. 119.
"TREASURY DEPARTMENT, June 27th, 1898.

"*To Collectors of Customs and others:*

"The following is printed for the information of "owners, masters and agents of vessels visiting "your office and others interested in shipping:

"The President, by his proclamation of April 26, "1898, declared 'the neutral flag covers the enemy's "'goods with the exception of contraband of "'war.'

"The term contraband of war comprehends only "articles having a belligerent destination, as to an "enemy's port or fleet.

"With this explanation the following articles are "for the present to be treated as contraband:

"Absolutely contraband (long list of military and "naval supplies, such as arms, ammunition, armor "plate, salt peter, &c.).

"Conditionally contraband, coal when destined "for naval stations, a port of call or a ship or "ships of the enemy; materials for the construc-"tion of railways or telegraph, and money, when "such materials or money are destined for the "enemy's forces; provisions when destined for an "enemy's ship or ships, or for a place that is be-"sieged."

"O. L. SPAULDING,
"*Acting Secretary.*

There was a blockade of the port of Havana, but Havana was at no time during the war a besieged city.

"A *siege* is a *military* investment of a place, so "as to intercept, or render dangerous, all com-"munication between the occupants and persons "outside of the besieging army; and the place is "said to be *blockaded*, when such communication, "*by water*, is either entirely cut off or rendered

"dangerous by the presence of the blockading "squadron. A place may be both besieged and "blockaded at the same time, or its communica- "tions by water may be intercepted, while those "by land may be left open, and *vice versa*. Both "are instituted by the rights of war and for the "purpose of injuring the enemy, and both impose "upon neutrals the duty of not interfering with the "operations of the belligerents. But there is an "important distinction with respect to neutral "commerce, between a maritime blockade and a "military siege. The object of a blockade is solely "to distress the enemy, intercepting his commerce "with neutral States. It does not, generally, look "to the surrender or reduction of the blockaded "port, nor does it necessarily imply the commission "of hostilities against the inhabitants of the place. "The object of a military siege is, on the other "hand, to reduce the place by capitulation, or "otherwise, into the possession of the besiegers. "It is by the direct application of force, that this "object is sought to be attained, and it is only by "forcible resistance that it can be defeated. Hence, "every besieged place is, for the time, a military "post; for even when it is not defended by a "military garrison, its inhabitants are converted "into soldiers by the necessities of self-defence. "This distinction is not merely nominal, but, as "will be shown hereafter, leads to important con- "sequences in determining the rights of neutral "commerce, and in deciding questions of cap- "ture."

Halleck's International Law, 3d Edition, Vol. II., pp. 174, 186.

Spain, in her proclamation of April 23, defined contraband goods as follows:

"Cannon, quick firing guns, shells, rifles, all pat- "terns of cutting and thrusting weapons, and arms "of precision, bullets, bombs, grenades, fulminates, "capsules, fuses, powder, sulphur, dynamite, and "explosives of all kinds as well as uniforms, straps, "pack saddles, and equipment for artillery and cav- "alry, marine engines, and in general all appliances "used in war."

As published in New York papers, April 25, 1898.

Arms, ammunition, military or naval equipment are essential contraband. Goods destined for peaceful or purely domestic uses are essentially not contraband. Other goods not inherently contraband may be declared contraband when destined especially for the support of the war or as sustenance of the enemy's armies.

Provisions, as a rule, are not regarded as contraband; though there have been instances where, with a view of cutting off the supplies of a beleagured country, provisions, especially those of a manufactured character, have been specifically proclaimed contraband; but usually with the limitation that they thereby become subject to pre-emption by the capturing nation, and not to confiscation. There being circumstances under which provisions might be of peculiar value to a besieged enemy, a belligerent may deem it essential to cut off supplies of such provisions, whether the same are destined for civil or military use. Neutrals naturally object to an arbitrary and perhaps whimsical regulation affecting the product of their countries, and to meet such objections, and at the same time to subserve the military purposes of the belligerent the goods have been declared subject, not to confiscation, but to pre-emption.

Indeed the subject is not infrequently regulated by public treaties, and certain of such treaties entered into by the United States effectually designate the status of Kleinwort Sons & Co.'s goods and the rights of their neutral owners.

The claimants are British subjects, and our treaty with Great Britain provides:

> "In order to regulate what is in future to be "esteemed contraband of war, it is agreed that "under the said denomination shall be comprised "all arms and implements serving for the pur-"poses of war, by land or sea, such as cannon, "muskets, mortars, petards, bombs, grenades, car-"casses, saucisses, carriages for cannon, musket-"rests, bandoliers, gun-powder, match, salt petre, "ball, pikes, swords, head pieces, cuirasses, hal-"berts, lances, javelins, horse-furniture, holsters, "belts, and generally all other implements of war, "as also timber for ship-building, tar or rozin, cop-"per in sheets, sails, hemp and cordage, and gen-

" erally whatever may serve directly to the equip-
" ment of vessels, unwrought iron and fir planks
" only excepted; and all the above articles are
" hereby declared to be just objects of confiscation
" whenever they are attempted to be carried to an
" enemy.

" And whereas the difficulty of agreeing on the
' precise cases in which alone provisions and other
" articles not generally contraband may be regarded
" as such, renders it expedient to provide against
" the inconveniences and misunderstandings which
" might thence arise; It is further agreed that
" whenever any such articles so becoming contra-
" band, according to the existing law of nations,
" shall for that reason be seized, the same shall not
" be confiscated, but the owners thereof shall be
" speedily and completely identified; and the cap-
" tors, or, in their default, the Government under
" whose authority they act, shall pay to the mas-
" ters or owners of such vessels the full value of all
" such articles, with a reasonable mercantile profit
" thereon, together with the freight, and also the
" demurrage incident to such detention."

Treaty of 1794, *Art. XVIII.; Treaties and Conventions, pp.* 389, 390.

Our treaty with Spain defined contraband fully as explicitly:

" Under this name of contraband or prohibited
" goods, shall be comprehended arms, great guns,
" bombs with the fuses, and other things belong-
" ing to them, cannon-ball, gun-powder, match,
" pikes, swords, lances, spears, halberds, mortars,
" petards, grenades, saltpetre, muskets, musket-
" balls, bucklers, helmets, breast-plates, coats of
" mail, and the like kind of arms proper for arming
" soldiers, musket-rests, belts, horses with their
" furniture, and all other warlike instruments
" whatever. These merchandizes which follow
" shall *not* be reckoned among contraband or pro-
" hibited goods; that is to say, all sorts of cloths,
" and all other manufactures woven of any wool,
" flax, silk, cotton, or any other materials what-
" ever; all kinds of wearing apparel, together with
" all species whereof they are used to be made; gold
" and silver, as well coined as uncoined, tin, iron
" latton, copper, brass, coals, as also wheat,

"barley, oats, and any other kind of corn and "pulse; tobacco, and likewise all manner of "spices, salted and smoked flesh, salted fish, cheese "and butter, beer, oils, wines, sugars, and all sorts "of salts, and *in general all provisions which* "*serve for the sustenance of life.*"

Treaty of 1795, *Sec. XVI.; Treaties and Conventions, p.* 1011.

We find no treaty between this country and Uruguay defining contraband.

The captured cargo was the produce of a neutral country, Uruguay, destined, so far as the jerked beef was concerned, for the ordinary food supplies of the plantation negroes of Cuba, and unfit for other use.

Third.

THE TITLE TO THE GOODS AND THE RIGHT TO POSSESSION OF THEM AT THE TIME OF CAPTURE WAS IN NEUTRALS.

The principles of ordinary jurisprudence are as applicable in determining title to goods captured in time of war as in defining in the civil courts the rights of contesting claimants in times of peace.

Thus, goods shipped in open war to become the property of an enemy consignee on arrival, without any intermediate act to be done by or on behalf of the shippers, which he could exercise to prevent delivery, are deemed, while afloat, the property of the consignee. Such are goods which are shipped under bills of lading defining the consignee specifically and by name.

It is a rule of the civil courts.

The Thames, 14 *Wallace*, 99, 108.

And it is likewise the rule of the prize courts.

The Josephine, 4 *C. Rob.*, 25.

A qualification to the general rule is, perhaps, found in the doctrine that a transfer in open war, by an enemy, of goods in transit is void as against captors.

The Francis, 8 *Cranch*, 354.

But a transfer made by an enemy prior to the outbreak of hostilities in respect of goods in transit, is valid.

The Vrow Margaretha, 1 *C. Rob.*, 336.
The Anna Green, 1 *Gallison*, *p.* 274.
Halleck's International Law, *3d Ed.*, *Vol. II.*, *p.* 91.
Hall's International Law, *p.* 526.
Wheaton's International Law, *p.* 485.

And even in open or flagrant war, transfers of title by neutrals or by subjects are valid. The rules of prize courts are intended merely to protect captors against frauds upon their rights.

There is no possible object in restraining transfers where the goods are equally exempt from capture before and after the transfer.

Wherever the principles of transfer in transit have been stated by writers the restrictions are impressed only in respect of transfers from enemies in time of war.

> "Transfers during war, made with fraudulent in-
> "tent by a belligerent to a neutral, need not be
> "recognized by the other belligerent."
>
> *Glenn's International Law*, 238.

It will be observed that all the bills of lading issued by the master of the *Carlos F. Roses* in respect of his cargo, recited that the shipments were made by Pla Gibernau & Company, and that they were to be delivered in Havana, "to order" (*Exhs. C, D, E, F, T, U, V, W, X, Y; C F H 1, C F H 2, C F H 3*; *Translations*, *pp.* 38, 39), and that, moreover, each bill of lading bore the endorsement in blank of Pla Gibernau & Company.

The possession of bills of lading, thus drawn and endorsed, when acquired for value and in the absence of fraud, gives to the possessor the title to the property.

A cargo afloat is incapable of manual delivery, and

title passes by the delivery of a symbol, the bill of lading, with any usual indicia of ownership in the way of indorsement. This principle, long established in custom, received judicial sanction in Liebkanow *vs.* Mason (5 *T. R.*, 683), and has been uniformly followed since.

Dows vs. *Greene*, 24 *N. Y.*, 638.
Anderson vs. *Clark*, 2 *Bing.*, 20.
Mills Co. vs. *East & West India Docks*, 6 *Q., B. D.*, 480.
Barber vs. *Meyerstein*, 4 *House of Lords*, 325, 335.

The foregoing cases establish that the vesting of title does not depend upon whether the transfer of documents is made pursuant to an unqualified sale, or pursuant to advances by the transferee. The right of the transferee in the latter case to dispose of the goods is established in Ogg *vs.* Shuter (*Law Rep.*, 1 *C. P. D.*, 47).

The only cases in which the vesting of legal title in the transferee for advances has been doubted are those in which it has been sought to hold him personally liable for freight; and in certain of such cases it has been decided, after much conflict between the highest authorities, that the transferee is without such liability.

Sewell vs. *Burdick*, *L. R.*, 10 *App. Cas.*, 74.
First Nat'l Bank vs. *Kelley*, 57 *N. Y.*, 34.

Whatever may have been the relations between Valenti, the owner of the vessel, and Pedro Pages, to whom it was proposed that the entire cargo should be ultimately delivered, we need not inquire. It is only clear that such relations do not concern the present case. Evidently Pla Gibernau & Company were the sellers of the goods, and concerned only in receiving the agreed price as soon as possible; and, apparently, Valenti and Pages were purchasing the goods to be paid for practically on delivery in Havana, Valenti perhaps taking a larger share of the expected profits in consideration of the use of his vessel. To facilitate the transaction the ordinary intervention of bankers was secured. Such intervention was made; but with the reservation of all such securities as bankers ordinarily require.

Now, although the invoices indicated that in respect of the jerked beef sixty per cent. was for account of the vessel and forty per cent. for account of Pedro Pages, and in respect of the garlic fifty per cent. was for account of Pedro Pages, and the remaining fifty per cent. for account of Pla Gibernau & Company, who, to this small extent, joined in the venture, every one of the bills of lading provided that the goods should be delivered at Havana, to the order of Pla Gibernau & Co.

Pla Gibernau & Co. were neutral merchants of Uruquay and were careful to retain absolute control of the shipments until they had their money in hand.

The invoice price of the jerked beef was $27,497.24, and of the garlic $3,218.75 (*Exhs. Z and AA; Translations, pp.* 40, 41). The aggregate of the two was $30,716.99.

To provide for payment two bills of exchange were drawn upon Kleinwort Sons & Co., one for £2,714/13/8 by Pla Gibernau & Company to the order of the London and River Plate Bank, Limited; the other for £3,583/11/6, by the master of the *Carlos F. Roses*, to the order of Pla Gibernau & Co., and endorsed by them as follows:

> "Pay the London & River Plate Bank, Limited,
> "or order, Pla Gibernau & Co."

Then, in regular course, these drafts and the endorsed bills of lading came into the lawful possession of the London and River Plate Bank, Limited, on or about March 15th.

They, in accordance with ordinary business usage, advanced to Pla Gibernau & Co. the whole or the greater part of the money specified in the drafts.

In turn, they forwarded the drafts and bills of lading to their London house, and presented the drafts to Kleinwort & Co. for acceptance, on April 6.

The bills of lading of half the cargo were at the same time handed over, and the remaining bills of lading upon arrival and certainly before the capture of the vessel (*Harcke's Afft., p.* 18).

On April 9 Kleinwort Sons & Company forwarded to their own agents in Havana, N. Gelak & Company, such bills of lading as they then had in hand, to be delivered

to Pedro Pages upon payment of their advances (*Harcke's Afft., p.* 18).

These bills of lading were never taken up by Pedro Pages, and apparently were delayed in arriving in Havana by the breaking out of the war, so that they did not reach the hands of N. Gelak & Co. until September 23, 1898 (*Harcke's Afft., p.* 30).

The bills of lading covering the other portion of the cargo were never forwarded by Kleinwort Sons & Co. to Havana. Quite possibly, and we are willing to assume, they were held in London awaiting instructions from Valenti, who might prefer to take them up there.

It may be, however, that they did not reach Kleinwort Sons & Co.'s hands until after April 21, through delays in the mails from Uruguay. But delivery of the bills of lading to Kleinwort Sons & Co. was assured at the time they gave their acceptance to the drafts on April 6 appears from the fact that they gave their acceptance solely in consideration of the delivery of the bills of lading, as security for the liability incurred by them (*Harcke's Afft., p.* 18).

Undue importance is attached by the counsel for the Government and the captors to the circumstance that upon the face of one draft the drawers instructed Kleinwort Sons & Co. to charge the amount of the draft to the account of Pedro Pages, and that upon the face of the other draft the drawers instructed Kleinwort Sons & Co. to charge the amount of the draft to the account of P. Roses Valenti.

Assuming that Valenti and Pages were Spaniards, as we believe them to be, these instructions would be important if Kleinwort Sons & Co. had followed them and had not held the shipping documents, and had looked solely to the credit of Pedro Pages and P. Roses Valenti for reimbursement. But as it was, and as is almost universally the case, in similar transactions, the directions were purely formal and in the way of convenient identification. The *credit* was given to *the goods* and the title to the goods, and possession and control of them, was absolutely secured by the bankers.

So far from there having been a transfer of the property from an enemy to a neutral during a period of open war, it is apparent that from first to last an enemy never for one moment held title to an atom of the cargo. Up to the time of shipment the entire cargo was owned by Pla Gibernau & Co. They transferred it to the London and River Plate Bank, Limited. They in turn transferred it to Kleinwort Sons & Company, and Kleinwort Sons & Company held it through to the end.

It may be admitted that all these transfers were made between neutrals for the purpose of facilitating a sale ultimately to a Spaniard at a Spanish port. But the contemplated sale was arranged in times of peace; and even if it had been arranged in time of war it would not, in the absence of a purpose to break a blockade, affect the title to the goods so long as such title was held by a neutral.

The purpose of capturing goods is to weaken the resources of the enemy by taking those things which add to their wealth and their strength. It would in nowise disastrously affect Pedro Pages or Valenti to have goods captured which did not belong to them, and which could never belong to them until they should pay full value for them.

It is the right of neutrals to trade with the enemy in goods that are not contraband of war, and their rights are respected by belligerents, and their goods are protected to the full extent of their interest in them. The goods are confiscated only to the extent that the enemy have acquired a pecuniary interest in them.

Fourth.

WHATEVER REFINEMENTS MAY BE DRAWN AS TO THE NATURE OF THE CLAIMANTS' TITLE IN THE GOODS, IT IS CERTAIN THAT THEY HELD CONTROL OF THE SHIPMENTS.

Such control conferred upon them either an absolute legal title or a *jus in re*, either one of which leads to a release of the goods.

The entire issue of each set of bills of lading was possessed by Kleinwort Sons & Co. under endorsements which gave to them, and to them alone, the right of demanding delivery from the vessel.

Anderson v. *Clark*, 3 *Bing.*, 20.

Fifth.

LIENS FOR ADVANCES, WHEN ACCOMPANIED BY POSSESSION OR CONTROL OF THE PROPERTY AGAINST WHICH ADVANCES ARE MADE, ARE RECOGNIZED BY THE PRIZE COURTS.

In the War of 1812 a shipment of goods, part of the cargo of the *San Joze Indiano*, was claimed by one Lizaur, a neutral, residing in Rio de Janeiro. The shipment had been made by Dyson Bros. & Co., of Liverpool, and was consigned to Dyson Bros. & Finney, of Rio de Janeiro. The two houses of Dyson Bros. & Co., of Liverpool, and Dyson Bros. & Finney, of Rio, consisted of the same persons. The proofs indicated that Lizaur had sent hides out to the Liverpool house of Dyson Bros. & Co. for sale, with instructions to them to make shipments back to him. The proceeds of the hides had not been realized at the time of shipment of the captured goods. Moreover, Lizaur's orders far exceeded the expected amount of such proceeds. Dyson Bros. & Co. were apparently unwilling to give credit to Lizaur, and, therefore, in making the captured shipments on his order, forwarded the bills of lading and invoices to their own house of Dyson Bros. & Finney, writing:

> "For Mr. Lizaur we open an account in our "books here and debit him, etc. We cannot yet "ascertain the proceeds of hides, etc., but find his "order for goods will far exceed the amount of "these shipments; therefore, we consign the whole "to you that you may come to a proper under-"standing with him."

That is, Dyson Bros. & Co. retained absolute control of the goods which had been ordered by Lizaur until "a proper understanding" as to the payment of the goods had been reached.

The invoice which was thus forwarded to Dyson Bros. & Finney was headed "Consigned to Messrs. Dyson Bros. " & Finney by order and for account of J. Lizaur."

After the capture Lizaur filed a claim to the goods, but it was held that no interest in the goods had as yet passed to him, even though Dyson Bros. & Co. had in their hands the proceeds of his hides.

The San Joze Indiano, 1 *Wheat.*, 208.

It is to be assumed that upon analagous facts the Court would be just as ready to vest title to captured goods in a friend as in an enemy.

In May, 1861, the *Amy Warwick* sailed from Rio with a cargo of coffee destined to Hampton Roads for orders. By her charter-party she was to go either to Richmond, New York, Philadelphia or Baltimore. She was captured August 10 and taken into the District of Massachusetts for condemnation. The claims of Dunlop, Moncure & Co., of Richmond, and of Edmund Davenport & Co., of Richmond, to certain portions of the cargo were rejected; and the vessel herself was condemned. A claim put forward by J. L. Phipps & Co. in respect of advances upon cargo was sustained. The claimants were all British subjects and constituted the commercial houses of J. L. Phipps & Co., of New York; Phipps Bros. & Co., of Rio, and Phipps & Co., of Liverpool. Dunlop, Moncure & Co. had chartered the vessel and sent her to Rio with a cargo consigned to Phipps Bros. & Co. for sale. With the proceeds of this cargo, adding £2,000 of their own money, Phipps Bros. & Co. gave to the brig the cargo of coffee which was subsequently captured. The bill of lading recited that they were the shippers, and that it was to be delivered to their order. They endorsed the bills of lading over to their firm of J. L. Phipps & Co., of New York. J. L. Phipps & Co., of New York, upon receiving the bills of lading, endorsed and delivered them to Charles M. Fry & Co., of New

York, agents for Dunlop, Moncure & Co., under an agreement that from the proceeds of the coffee there should first be paid to J. L. Phipps & Co. the £2,000 advanced by their Rio firm in purchasing the cargo. The bills of lading were delivered actually to the agents of the enemy, and with no protection to the shippers except their agreement to pay the advance out of the proceeds of the sale. The claim, however, of J. L. Phipps & Co. was sustained by the District Court and was affirmed on appeal in the Circuit Court and in this Court.

The Amy Warwick, 2 *Sprague*, 150; 2 *Black*, 635.

The bark *Winifred* was captured in May, 1861, off Cape Henry, and confiscation of vessel and cargo was demanded as being enemy's property. The cargo, consisting of 4,200 bags of coffee, had been purchased by Phipps & Co. in Rio, as agents for Crenshaw & Co., Richmond merchants. The funds in their hands for the purchase being insufficient, they defrayed three-eighths of the cost of the purchase. The consignment formally was to shippers' order, but the bills of lading were sent forward endorsed to Crenshaw & Co. Subsequently Phipps & Co. made further advances of $20,622.26 on April 26, while the goods were in transit, and *after* the outbreak of hostilities, taking a reassignment of the bills of lading. The District Court ordered the restoration of three-eighths of the cargo to Phipps & Co., but the remaining five-eighths was condemned.

The Winifred, Blatchford's Prize Cases, 33.

The decree of the District Court was affirmed by the Circuit Court, except as to the five-eighths portion of the cargo condemned below. As to that, the Circuit Court allowed further proofs, and on those that Court, December 3, 1863, allowed Phipps & Co. the amount of their advances with interest.

The Winifred, Blatchford's Prize Cases, p. 35, *note.*

The *Lynchburg* was captured with her cargo in May, 1861, at the mouth of the Chesapeake Bay. 2,045 bags

of coffee, part of her cargo, had been purchased by Maxwell, Wright & Co., as agents for Wortham & Co., of Richmond. Maxwell, Wright & Co. took bills of lading, consigning the cargo to their own order, and drew against them on Brown, Shipley & Co., of London, for £6,090, who accepted the drafts and subsequently paid them. The entire cargo was destined for enemies ultimately. Wortham & Co. claimed 504 of the bags of this shipment subject to the lien of Brown, Shipley & Co. The District Court restored to Brown, Shipley & Co. 1,541 bags by consent of the prosecuting attorney, but condemned the 504 bags claimed by Wortham & Co.

The Lynchburg, Blatchford's Prize Cases, 51.

Upon appeal taken by Brown, Shipley & Co. the Circuit Court ordered further proofs in respect of the 504 bags, and these were ultimately restored to Brown, Shipley & Co.

The Lynchburg, supra, 52, *note*.

The case of *Sally Magee*, cited by counsel for the captors, is clearly to be distinguished from the foregoing cases, as might be expected from the fact that it was decided in the trial court by the same Judge.

In the foregoing cases the liens for advances were respected and sustained. In the case of the *Sally Magee* it was adjudicated upon the facts that there was no lien. Coleman & Company, who claimed the lien, appear to have been creditors of the enemy, owners of the goods; and *after capture* of the goods were designated by the owners to receive the goods in place of Davenport & Company, who had previously been designated as consignees. At that time, too, after the capture of the goods, letters were given by the owners of the goods to Coleman & Co. authorizing them to sell the cargo, and from the proceeds pay their account.

The cargo was condemned by the District Court.

Sally Magee, Blatchf. Prize Cas., 382.

The decree of condemnation was affirmed in this Court.

Sally Magee, 3 *Wallace*, 451.

The case of the *Mary and Susan*, also relied upon by the counsel for the captors, does not seem to be in point.

American merchants, G. & H. Van Wagenen, had ordered a shipment of certain goods from Cross & Co. Cross & Co. caused the goods to be shipped, the consignment being made by bills of lading explicitly in favor of G. & H. Van Wagenen. The invoice of the goods showed that they had been bought by Cross & Co. "by order and "for account and risk of G. & H. Van Wagenen," but an entry was made thereon signed by Cross & Co.

> "The goods are now the property of Messrs.
> "Spooner, Atwood & Co., bankers, of Birmingham,
> "to whom you will please remit the amount of
> "this invoice.

The Court held that when the goods went on board the vessel under a bill of lading consigning them directly to G. & H. Van Wagenen they became the property of G. & H. Van Wagenen, and, therefore, ordered the restitution of the goods.

The whole claim of the captors in that case was that inasmuch as Spooner, Atwood & Co. could not have authorized G. & H. Van Wagenen to take the goods, the original order for purchase being given, not to them, but to Cross & Co.; therefore, the title had never passed to G. & H. Van Wagenen.

This line of reasoning was not sustained by the Court, and it is difficult to see in what way the case affords any support to the captors' contentions here.

Sixth.

THE ENTIRE CARGO IS COVERED BY THE CLAIMS OF KLEINWORT SONS & COMPANY.

The counsel for the Government intimate that a portion of the garlic was not invoiced to either Valenti or to Pedro

Pages, but was apparently invoiced to Pla Gibernau & Co., who have not filed any claim thereto.

It is quite true that the invoice shows that Pla Gibernau & Co. retained an interest in one-half of the garlic, as shown by the invoice (*Exhibit AA.; Translation, p.* 41).

The invoices have nothing to do with the title to the goods, nor do they affect in any way the control of the goods. Both the title and control of the goods are through the *bills of lading*, and the *bills of lading* cover *all* the beef and *all* the garlic (*Bills of Lading; Translations, pp.* 38–40).

In each case the bills of lading recited "Shipment by "Pla Gibernau & Co. for account and risk of whom it "may concern," and then went on to provide in each instance that the goods should be delivered "to order." The parties concerned were the parties to whom the bills of lading were endorsed and delivered.

Kleinwort Sons & Co. in lawfully possessing themselves of all the bills of lading of all the cargo became entitled to the entire cargo.

Seventh.

THE FACT THAT THE CLAIMANTS HAVE BEEN OR WILL BE INDEMNIFIED BY THE COLLECTION OF INSURANCE IS IMMATERIAL.

In his affidavit of September 27 Mr. Harcke states:

> "The said cargo was ultimately destined for Don "Pedro Pages, of Havana, who, in the ordinary "course of business, would, by payment to or in- "demnification of Kleinwort Sons & Company, or "their agents in that behalf, take up the said bills of "lading and thus be enabled thereon to take the "goods. No payment whatever has been made to "Messrs. Kleinwort Sons & Company, or their "agents, on account of the payments made by them "through the said advances by said Don Pedro

"Pages, or by any other person on his behalf or "otherwise; and the said Kleinwort Sons & Com- "pany have been and are wholly unindemnified in "respect of their said payments, except so far as "the proceeds of the said cargo and the insurance "thereon, which, as the owners of the said goods, "they have become entitled to collect, thereby sub- "rogating to their own rights, to the extent of said "payments, the insurers of the said goods."

Harcke's Affi., p. 18.

The counsel for the Government and the counsel for the captors unite in asserting special rights to the captors to this cargo, because it seems to have been insured, and insured, as they suspect, against "risks of war."

It is probably the exception when cargo goes to sea uninsured; and no adjudication is found in which the circumstance that the owner has, by special contract of insurance, shifted his loss upon other shoulders, has been held to operate to the advantage of the captors.

Not only is substantially every shipment of goods which goes upon the ocean insured, but every such shipment of goods is insured against the risks of war.

The ordinary policy of marine insurance recites that the insurers are "contented to bear the perils and adventures "of the seas, men of-war, fires, enemies, piracy, rovers, "thieves, jettisons, &c., &c."

Often insurers insert in their policies warranties on the part of the assured to avoid blockaded ports and other similar conditions. Moreover, upon policies issued in time of war, insurers may impose additional premiums upon voyages in waters which invite danger; but the ordinary standard marine policy of insurance is against the risks of war.

If the insurers have paid this loss or are bound to pay this loss to Kleinwort Sons & Co. they will be subrogated to the claimants' rights; but that subrogation comes to them only, because they have paid for it dollar for dollar. In fact they will have paid fully two dollars for one if the recovery is limited to the proceeds of the cargo.

Their equities appear to be higher than those of the captors.

Eighth.

THE CLAIMS OF KLEINWORT SONS & COMPANY SHOULD BE SUSTAINED TO THE FULL AMOUNT ALLEGED IN THEIR TEST AFFIDAVIT, TO WIT, $30,644.35, WITH INTEREST.

The goods have been sold as perishable, and have, it is asserted, realized less than half that amount.

Under the treaty of 1794 with Great Britain the captors, or in their default the Government, should pay the full original value of the cargo, with a reasonable mercantile profit, at least to the extent of Keinwort Sons & Co.'s advances.

Provision therefor should be made in the mandate in case it appears, as we apprehend, that the proceeds will not otherwise suffice.

WILHELMUS MYNDERSE,
Advocate.

No. 243.

Office Supreme Court U. S.
FILED
MAR 15 1900
JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States.

UNITED STATES,
Appellant,

AGAINST

KLEINWORT SONS & COMPANY, claimants of the cargo of the CARLOS F. ROSES.

October Term, 1899.
No. 243.

The cases of the *Hampton*, 5 Wallace, 372, and the *Battle*, 6 Wallace, 498, now cited by the Attorney-General, appear to have been cases of condemnation for violation of blockade. The arguments of the Court are based upon that theory.

In the case at bar, Kleinwort Sons & Company claim not merely a lien to the cargo, but the title to the cargo.

The cargo was shipped by neutrals, under advances by neutrals, and was pledged to neutrals.

It was the right of neutrals to trade with Cuban ports without violating blockade, and goods cannot be condemned upon the ground of enemy ownership until the title has actually and absolutely passed to the enemy.

WILHELMUS MYNDERSE,
Advocate.

Statement of the Case.

that when these goods were delivered to the vessel, they became the property of the consignors named in the invoices;

(3) That the British company got the legal title to the goods and the right of possession only if such were the intention of the parties, and that that intention was open to explanation, although the persons holding the papers might have innocently paid value for them;

(4) That in prize courts it is necessary for the claimants to show the absence of anything to impeach the transaction, and at least to disclose fully all the surrounding circumstances, and that the claimants had failed to do so;

(5) That the right of capture acts on the proprietary interest of the thing captured at the time of the capture, and is not affected by the secret liens or private engagements of the parties;

(6) That in this case the belligerent right overrides the neutral claim, which must be regarded merely as a debt and the assignment as a cover to an enemy interest.

The Carlos F. Roses was a Spanish bark of 499 tons, hailing from Barcelona, Spain, sailing under the Spanish flag, and officered and manned by Spaniards. She had been owned for many years by Pedro Roses Valenti, a citizen of Barcelona. Her last voyage began at Barcelona, whence she proceeded to Montevideo, Uruguay, with a cargo of wine and salt. All of the outward cargo was discharged at Montevideo, where the vessel took on a cargo consisting of jerked beef and garlic to be delivered at Havana, Cuba, and sailed for the latter port on March 16, 1898. On May 17, when in the Bahama Channel off Punta de Maternillos, Cuba, and on her course to Havana, she was captured by the United States cruiser New York and sent to Key West in charge of a prize crew. The bark and her cargo were duly libelled May 20. All of the ship's papers were delivered to the prize commissioners, and the deposition of Maristany, her master, was taken *in preparatorio*. Kleinwort Sons and Company of London, England, made claim to the cargo, consisting of a shipment of 110,256 kilos of jerked beef and 19,980 strings of garlic, and a further shipment of 165,384 kilos of jerked beef, alleging that they were its owners and that it was not lawful prize of war. In support of the claim the firm's agent in the United States filed a test affidavit made on information and belief. In this it was alleged that

Statement of the Case.

Kleinwort Sons and Company were merchants in London; that the members of the firm were subjects of the United Kingdom of Great Britain and Ireland; that in February and March, 1898, the bark, being then in Montevideo, bound on a voyage to Havana, took on board a cargo of jerked beef and strings of garlic shipped by Pla Gibernau and Company, merchants of Montevideo, to be transported to the port of Havana, and there to be delivered to the order of the shippers according to the condition of certain bills of lading issued therefor by the bark to Pla Gibernau and Company; that the members of the firm of Gibernau and Company were citizens of the Argentine Republic; that the bark left Montevideo on March 16, and proceeded on her voyage to Havana, until May 17, when, being at a point in the Bahama Channel off Martinique, she was captured by the United States cruiser New York, without resistance on her part, and sent into Key West as prize of war. That after the shipment of the cargo in Montevideo claimants made advances to the shippers and owners of the cargo in the sum of £6297, British sterling, to wit, £2714 item thereof, upon the security of said lot of 110,956 kilos of jerked beef and 19,980 strings of garlic, and £3583 item thereof, upon the security of said lot of 165,384 kilos of jerked beef; that at the time of making said advances and in consideration thereof, bills of lading covering the shipments were delivered to claimants duly indorsed in blank with the intent and purpose that they should thereby take title to said bills of lading, and to said shipments of jerked beef and garlic, and should, on the arrival of the vessel at her destination, take delivery of the shipments and hold the same as security for their said advances until paid, and with the right to dispose of said shipments and to apply the proceeds to the payment of their said advances; and accordingly the said Kleinwort Sons and Company did become and ever since have been and still are as aforesaid the true and lawful owners of the said bills of lading and of the shipments of jerked beef and garlic therein referred to. The affidavits further stated that the advances were equivalent in money of the United States to about $30,644.35, and that no part of the same had been paid, or otherwise secured to be paid.

THE CARLOS F. ROSES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 243. Argued January 12, 1900. — Decided May 14, 1900.

The Carlos F. Roses, a Spanish vessel, owned at Barcelona, Spain, sailed from that port for Montevideo, Uraguay, with a cargo which was discharged there and a cargo of jerked beef and garlic taken on board for Havana, for which she sailed March 16, 1898. On May 17, while proceeding to Havana, she was captured by a vessel of the United States and sent to Key West, where she was libelled. A British company doing business in London, laid claim to the cargo on the ground that they had advanced money for its purchase to a citizen of Montevideo, and had received bills of lading covering the shipments. The vessel was condemned as enemy's property, but the proceeds of the cargo, which had been ordered to be sold as perishable property, was ordered to be paid to the claimants. *Held*,

(1) That as the vessel was an enemy vessel, the presumption was that the cargo was enemy's property, and this could only be overcome by clear and positive evidence to the contrary;

(2) That on the face of the papers given in evidence, it must be presumed

Statement of the Case.

The cause was heard on the libel and claims of the master of the bark and Kleinwort and Company, and the evidence taken *in preparatorio*. The vessel was condemned as enemy property, and the court ordered the claimants of the cargo to "have sixty days in which to file further proof of ownership;" and because of its perishable nature the marshal of the court was ordered to advertise and sell the same, and deposit the proceeds in accordance to law. No appeal was taken on behalf of the vessel. The cargo was sold and the proceeds deposited with the assistant treasurer of the United States at New York, subject to the order of the court. The time for claimants to take further proofs was twice extended. No witnesses were produced by claimants, but Charles F. Harcke, claimants' manager in London, made three *ex parte* affidavits before the United States consul general, which were offered in evidence by claimants. Appended to the affidavits were a large number of exhibits purporting to be papers, or copies of papers, relating to the shipment of the cargo, and some of the financial transactions of some of those who had to do with it. From these affidavits and papers it appeared that the voyage of the Carlos F. Roses was a joint venture entered into by Pedro Pagés of Havana, a Spanish subject; the Spanish owners of the vessel, and Gibernau and Company. The whole cargo was made up of two shipments, one of jerked beef and one of garlic, which had been purchased by Gibernau and Company on commission, and by them delivered to the Carlos F. Roses "consigned to order for account and risk and by order of the parties noted" in the invoices. The shipment of jerked beef containing 275,640 kilos in bulk was divided thus: 60 %, 165,384 kilos, "to the expedition or voyage of the Carlos F. Roses;" 40 %, 110,256 kilos, "to Mr. Pedro Pagés of Havana." The shipment of garlic was divided thus: 9990 strings, "account of Mr. Pedro Pagés," and 9990 strings for "account of" Gibernau and Company. Both invoices were signed by Gibernau and Company, and bore date March 11 and 12, 1898.

Harcke stated in one of his affidavits that: "The said cargo was ultimately destined for Don Pedro Pagés, of Havana, who in the ordinary course of business would by payment to or in-

demnification of Kleinwort Sons & Co. or their agents in that behalf take up the said bills of lading and thus be enabled thereon to take the goods. No payment whatever has been made to Messieurs Kleinwort Sons & Co., or their agents, on account of the payments made by them through the said advances by said Don Pedro Pagés, or by any person on his behalf, or otherwise, and the said Kleinwort Sons & Co. have been and are wholly unindemnified in respect of their said payments except so far as the proceeds of the said cargo and the insurance thereon which as the owners of the said goods they have become entitled to collect, thereby subrogating to their own right to the extent of such payments the insurers of the said goods."

The ship's manifest appears to have been signed by Maristany, her master, at Montevideo, on March 15, 1898, and was *viséd* by the Spanish consul at that port the previous day. It described the ship's destination as Havana, and her cargo as made up of two lots of jerked beef containing 248,076 kilos and 29,970 kilos respectively, and one lot of garlic containing 19,980 strings, all shipped by Gibernau and Company, "to order." On March 14, Maristany issued three bills of lading, in which it was stated that the shipments were received from Gibernau and Company for transportation to Havana "for account and at the risk of whom it may concern;" one of the bills covering a shipment of 165,384 kilos of jerked beef; another of 110,256 kilos of jerked beef; and the third of 19,980 bunches of garlic.

March 15, Gibernau and Company drew this bill of exchange:

"No. 128. Montevideo, March 15, 1898. For £2714 13 8. Ninety days after sight you will please pay for this first of exchange (the second and third being unpaid), to the order of the London River Plate Bank, L'd, the sum of £2714 13 8, value received, which you will charge to the account of Pedro Pagés of Havana as per advice.

"Pla Gibernau & Co.

"To Messrs. Kleinwort Sons & Co., London."

On the same day Maristany drew this bill of exchange:

"No. 129. Montevideo, March 15, 1898. For £3583 11 6.

Ninety days after sight you will please pay for this first of exchange (the second and third being unpaid), to the order of Pla Gibernau & Co. the sum of £3583 11 6, invoice value of jerked beef, per Carlos F. Roses, which you will charge to the account of P. Roses Valenti, of Barcelona, as per advice.

"YSIDRO BERTRAN MARISTANY.

"To Messrs. Kleinwort Sons & Co., London."

This was indorsed by Gibernau and Company.

Valenti was the managing owner of the Carlos F. Roses. Both bills of exchange passed through the London River Plate Bank, L't'd, at Montevideo. On April 6 they were accepted by Kleinwort Sons and Company, and on May 9 were paid under discount by that firm. Harcke alleged that at the time of the acceptance of these bills of exchange, bills of lading covering the shipments of the garlic, and the jerked beef shipped for account and by order of Pagés, indorsed in blank by Gibernau and Company, were delivered to claimants, as security for the payment of the bills of exchange; and that thereafter the bill of lading covering the shipment of jerked beef made for the account and by the order of the Carlos F. Roses was delivered in like manner, but affiant did not state when. It was also alleged that on April 9 the bills of lading and invoices, covering the shipment of garlic and Pagés's share of the jerked beef were mailed by Kleinwort Sons and Company to Gelak and Company, bankers of Havana, to be held until the bills of exchange charged to the account of Pagés should be paid. Neither the instructions sent to Gelak and Company, nor a copy of them, were produced. Harcke further alleged that the bills of lading and the invoices covering the vessel's share of the shipment of jerked beef were retained by Kleinwort Sons and Company "pending the disposal of the said cargo." On May 17, the day of the capture, Kleinwort Sons and Company cabled Gelak and Company requesting them to return the bills of lading and invoices, which had been forwarded on April 9. June 9, Gelak and Company replied that the bills and invoices had not been received. On October 21 claimants produced these bills of lading, alleging that they had been received from Gelak and

Company on October 18, and that neither Pagés, Gibernau and Company, nor the owners of the Carlos F. Roses had paid claimants anything for or on account of their acceptance and payment of the bills of exchange. The cause of the cargo was heard a second time on the claim, test affidavit, and Harcke's affidavits, and a decree was entered for the payment to claimants of the proceeds of sale; from which decree the United States took this appeal.

Mr. James H. Hayden and *Mr. Assistant Attorney General Hoyt* for the United States. *Mr. Joseph K. McCammon* was on their brief.

Mr. Wilhelmus Mynderse for the claimants.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

The President's proclamation of April 26, 1898, declared the policy of the government in the conduct of the war would be to adhere to the rules of the Declaration of Paris therein set forth, one of them being thus expressed: "Neutral goods, not contraband of war, are not liable to confiscation under the enemy's flag."

The question is whether this cargo when captured was enemy property or not. The District Court held that both the title and right of possession were in these neutral claimants at the time of the capture, "as evidenced by the indorsed bills of lading and the paid bills of exchange," and, therefore, entered the decree in claimant's favor. As the vessel was an enemy vessel the presumption was that the cargo was enemy's property, and this could only be overcome by clear and positive evidence to the contrary. The burden of proving ownership rested on claimants. *The London Packet*, 5 Wheat. 132; *The Sally Magee*, 3 Wall. 451; *The Benito Estenger*, 176 U. S. 568.

Further proofs on claimant's behalf were ordered to be furnished within sixty days from June 2; and the time was enlarged to August 31; and again to October 15. The proofs

tendered were three affidavits of claimants' manager sworn to September 27, October 12 and October 21, 1898, respectively, with accompanying papers. Such *ex parte* statements, where further proofs have been ordered, though admitted without objection, are obviously open to criticism, but without pausing to comment on these in that aspect, we inquire whether they satisfy the requirements of the law of prize in respect of the establishment of the neutral character of this cargo under the circumstances.

Gibernau and Company were citizens of a neutral state; they were evidently commission merchants, and in each invoice a charge for their commission on the shipment appears. The invoices expressly provided that the goods were shipped "to order for account and risk and by order of the parties noted below." The consignees noted below in the invoice of the jerked beef were the owners of the vessel, "the expedition or voyage of the 'Carlos F. Roses'" and "Mr. Pedro Pagés of Havana," all Spanish subjects. The consignees of the garlic were "Mr. Pedro Pagés" and "the undersigned;" that is, Gibernau and Company. There were three sets of bills of lading issued by the master to Gibernau and Company. One covered the portion of the shipment of jerked beef made for the account of the vessel; another, the portion of that shipment made for the account of Pagés; the third, the shipment of garlic made for the joint account of Pagés and Gibernau and Company. All the bills set forth that the goods were taken for the account and at the risk of whom it might concern. The ship's manifest was signed under date March 15, and the destination of the cargo was stated thus: "Shipped by Pla Gibernau Co. To order." The *visé* of the consul of Spain, dated the day before, was: "Good for Havana, with a cargo of jerked beef and garlic." As the vessel had a share in the shipment of the jerked beef, and the consignees were named in the invoices, which set forth that the shipments were made by their orders for their account and at their risk, it would appear that the manifest was erroneous, and this and the fact that the bills of lading stated that the goods were taken "for account of whom it may concern," should be especially noted, since the reasonable inference is

that the consignees must have been known to the master. And it also should be observed that there was no charter party, which would have necessarily revealed the engagements of the vessel, but which naturally would not be entered into if the commercial venture was that of her owner. The general rule is that a consignor on delivering goods ordered, to a master of a ship, delivers them to him as the agent of the consignee so that the property in them is vested in the latter from the moment of such delivery, though the rule may be departed from by agreement or by a particular trade custom, whereby the goods are shipped as belonging to the consignor and on his account and risk. We think that on the face of the papers it must be concluded that when these goods were delivered to the vessel they became the property of the consignees named in the invoices. Hence the shipments of jerked beef must be regarded as owned by Pagés, or by him and the owners of the Carlos F. Roses. One half of the garlic belonged to Pagés, the remaining half was consigned to Gibernau and Company, and they did not claim, and have not claimed it, nor was it asserted that Gibernau and Company retained the ownership of any part of the cargo after its delivery to the vessel. Property so long unclaimed may be treated as in any view good prize. *The Adeline*, 9 Cranch, 244; *The Harrison*, 1 Wheat. 298. In fact, claimants admit that the whole cargo "was ultimately destined for Don Pedro Pagés of Havana." The bill of exchange drawn by Gibernau and Company named Kleinwort Sons and Company as acceptors, and directed them to charge the amount to the account of "Pedro Pagés of Havana as per advice." The bill drawn by Maristany also named Kleinwort Sons and Company as drawees, and directed them to charge the amount "to P. Roses Valenti of Barcelona as per advice." In neither of them was there any reference to the cargo, and, so far as appeared, the amounts were at once charged up to the persons named.

Harcke said that when the bills of exchange were accepted by Kleinwort Sons and Company bills of lading covering the shipment of 110,256 kilos of jerked beef and of the garlic were delivered to them in consideration of the acceptance of the

draft for £2714 13 8, and that bills of lading for the 165,354 kilos of jerked beef were afterwards delivered in consideration of the acceptance of the draft for £3583 11 6. But the date of the latter delivery was not given, and it affirmatively appeared that whenever these bills of lading reached Kleinwort Sons and Company they were retained "pending the disposal of the cargo." Both drafts were accepted April 6, and the bills of lading for the 110,256 kilos of jerked beef and for the garlic were forwarded to Gelak and Company on April 9, but the bills for the 165,384 kilos of jerked beef, whenever received, never were. The instructions to Gelak and Company were not put in evidence, nor any of the correspondence with Valenti or Pagés. In June, Gelak and Company cabled that the bills sent to them had not been received; in September they turned up, but no information was afforded as to how they came into Gelak and Company's possession; and in October duplicates were also received by claimants from Gelak and Company, with, so far as disclosed, no accompanying explanation. And Harcke's affidavits failed to set forth the relations, transactions or correspondence existing and passing between claimants and the enemy owners of the cargo. This, although, as Sir William Scott said in *The Magnus*, 1 C. Rob. 31, "the correspondence of the parties, the orders for purchase, and the mode of payment, would have been the points to which the court would have looked for satisfaction."

The affidavits alleged that claimants were wholly unindemnified except by the proceeds of the cargo and the insurance thereon, by which the insurers were subrogated to their own rights, but did not state whether the insurance contemplated a war risk, or why the bills of lading for the larger portion of the beef were retained by claimants and not sent to their Havana agents, or whether they retained them upon instructions from the enemy owners; or whether they came to claimants from Spain; nor did anything appear in respect of the interest of Pagés as consignee for himself, or in a representative capacity; nor of Valenti, the owner of the enemy vessel, who resided at Barcelona. The evidence of enemy interest arising on the face of the documents called on the asserted neutral owners to prove

beyond question their right and title. And still for all that appears, the documents may have been sent merely to facilitate delivery to the agent of the enemy owners.

Bills of lading stand as the substitute and representative of the goods described therein, and while *quasi* negotiable instruments, are not negotiable in the full sense in which that term is applied to bills and notes. The transfer of the bill passes to the transferee the transferror's title to the goods described, and the presumption as to ownership arising from the bill may be explained or rebutted by other evidence showing where the real ownership lies. A pledgee to whom a bill of lading is given as security gets the legal title to the goods and the right of possession only if such is the intention of the parties, and that intention is open to explanation. Inquiry into the transaction in which the bill originated is not precluded because it came into the hands of persons who may have innocently paid value for it. *Pollard* v. *Vinton*, 105 U. S. 7; *Shaw* v. *Railroad Company*, 101 U. S. 557.

Generally speaking, in the purchase and shipment of goods on bills of lading attached to bills of exchange drawn against them, the bill of exchange is drawn on the consignee and purchaser, and sent forward for collection through the banker at the place of shipment, who advances on the draft, and thereafter realizes on it through his correspondents, or by sale as exchange; or the banker at some other point, or at the general exchange center, may be the drawee of the bill of exchange instead of the consignee or real owner, the banker standing in the place of the owner, in virtue of some arrangement with his customer, or on the faith of a running account, the pledge of other securities, or the customer's personal liability, so that the draft may be charged up at once, and, at all events, the control of the goods is not the sole reliance of the banker.

In the case in hand, the captors succeeded to the enemy owners' rights, and could have introduced evidence as to the real nature of the transactions, and so have rebutted any presumption in favor of the bankers as purchasers for value, and although they did not do this, the question still remains that in prize courts it is necessary for claimants to show the absence of any-

thing to impeach the transaction, and at least to disclose fully all the surrounding circumstances. And this we think claimants have failed to do.

The right of capture acts on the proprietary interest of the thing captured at the time of the capture and is not affected by the secret liens or private engagements of the parties. Hence the prize courts have rejected in its favor the lien of bottomry bonds, of mortgages, for supplies, and of bills of lading. The assignment of bills of lading transfers the *jus ad rem*, but not necessarily the *jus in rem*. The *jus in re* or *in rem* implies the absolute dominion, — the ownership independently of any particular relation with another person. The *jus ad rem* has for its foundation an obligation incurred by another. Sand. Inst. Just. Introd., xlviii; 2 Marcadé, Expl. du Code Napoléon, 350; 2 Bouvier, (Rawle's Revision,) 73; *The Young Mechanic*, 2 Curtis, 404.

Claimants did not obtain the *jus in rem*, and, according to the great weight of authority, the right of capture was superior.

In *The Frances*, 8 Cranch, 418, a New York merchant claimed two shipments of goods, one in consequence of an advance made to enemy shippers by him in consideration of the consignment, and the other in virtue of a general balance of account due to him from the shippers as their factor. Both consignments were at the risk of the enemy shippers. The goods were condemned as enemy property, and the sentence was affirmed. This court said:

"The doctrine of liens seems to depend chiefly upon the rules of jurisprudence established in different countries. There is no doubt but that, agreeably to the principles of the common law of England, a factor has a lien upon the goods of his principal in his possession, for the balance of account due to him; and so has a consignee for advances made by him to the consignor. . . . But this doctrine is unknown in prize courts, unless in very peculiar cases, where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties. Such is the case of freight upon enemies' goods seized in the vessel of a friend, which is always decreed to the owner of the vessel. . . . But in cases of liens created by

the mere private contract of individuals, depending upon the different laws of different countries, the difficulties which an examination of such claims would impose upon the captors, and even upon the prize courts, in deciding upon them, and the door which such a doctrine would open to collusion between the enemy owners of the property and neutral claimants, have excluded such cases from the consideration of those courts. . . . The principal strength of the argument in favor of the claimant in this case, seemed to be rested upon the position, that the consignor in this case could not have countermanded the consignment after delivery of the goods to the master of the vessel; and hence it was inferred that the captor had no right to intercept the passage of the property to the consignee. This doctrine would be well founded, if the goods had been sent to the claimant upon his account and risk, except in the case of insolvency. But when goods are sent upon the account and risk of the shipper, the delivery to the master is a delivery to him as agent of the shipper, not of the consignee; and it is competent to the consignor, at any time before actual delivery to the consignee, to countermand it, and thus to prevent his lien from attaching. Upon the whole, the court is of opinion that, upon the reason of the case, as well as upon authority, this claim cannot be supported, and that the sentence of the court below must be affirmed with costs."

In *The Mary and Susan*, 1 Wheat. 25, an American merchantman bound from Liverpool to New York was captured by a privateer of the United States during the war of 1812. In her cargo were certain goods which had been shipped by British subjects to citizens of the United States, in pursuance of orders received before the declaration of war. Previous to the execution of the orders the shippers became embarrassed, and assigned the goods to certain bankers to secure advances made by them, with a request to the consignees to remit the amount to the bankers, who also repeated the same request, the invoices being for gain and risk of the consignees, and stating the goods to be then the property of the bankers, and it was held that the goods having been purchased and shipped in pursuance of orders from the consignees, the property was originally vested in them,

and was not devested by the intermediate assignment, which was merely intended to transfer the right to the debt due from the consignees.

In *The Hampton*, 5 Wall. 372, the schooner Hampton and her cargo had been captured, libelled and condemned as prize of war. The master of the vessel was her owner, but interposed no claim; nor did any one claim the cargo. One Brinckley appeared and claimed the vessel as mortgagee. The *bona fides* of this mortgage was not disputed; nor that he was a loyal citizen. But his claim was dismissed, and, the case having been certified to this court, it was held that in proceedings in prize, and under the principles of international law, mortgages on vessels captured *jure belli* are to be treated only as liens subject to be overriden by the capture. Mr. Justice Miller said:

"The ground on which appellant relies is, that the mortgage, being a *jus in re* held by an innocent party, is something more than a mere lien, and is protected by the law of nations. The mortgagee was not in possession in this case, and the real owner who was in possession admits that his vessel was *in delicto* by failing to set up any claim for her. It would require pretty strong authority to induce us to import into the prize courts the strict common law doctrine, which is sometimes applied to the relation of a mortgagee to the property mortgaged. It is certainly much more in accordance with the liberal principles which govern admiralty courts to treat mortgages as equity courts treat them, as a mere security for the debt for which they are given, and therefore no more than a lien on the property conveyed. But it is unnecessary to examine this question minutely, because an obvious principle of necessity must forbid a prize court from recognizing the doctrine here contended for. If it were once admitted in these courts, there would be an end of all prize condemnation. As soon as a war was threatened, the owners of vessels and cargoes which might be so situated as to be subject to capture, would only have to raise a sufficient sum of money on them, by *bona fide* mortgages, to indemnify them in case of such capture. If the vessel or cargo was seized, the owner need not appear, because he would be indifferent, having the value of his property in his

hands already. The mortgagee having an honest mortgage which he could establish in a court of prize, would either have the property restored to him or get the amount of the mortgage out of the proceeds of the sale. The only risk run by enemy vessels or cargoes on the high seas, or by neutrals engaged in an effort to break the blockade, would be the costs and expenses of capture and condemnation, a risk too unimportant to be of any value to a belligerent in reducing his opponent to terms. The principle which thus abolishes the entire value of prize capture on the high seas, and deprives blockades of all danger to parties disposed to break them, cannot be recognized as a rule of prize courts."

In *The Battle*, 6 Wall. 498, the steamer Battle and cargo were captured on the high seas as prize of war, brought into port and condemned, for breach of blockade and also as enemy property. Two claims were set up against the steamer in the court below, one for supplies, and another for materials, furnished, and for work and labor in building a cabin on the boat. These claims were dismissed, and the decree affirmed by this court, Mr. Justice Nelson delivering the opinion, saying: "The principle is too well settled that capture as prize of war, *jure belli*, overrides all previous liens, to require examination."

Such is the rule in the British prize courts. *The Tobago*, 5 C. Rob. 218; *The Marianna*, 6 C. Rob. 24; *The Ida*, Spinks Prize Cases, 26.

The Tobago was a case of claim to a captured French vessel, made on behalf of a British merchant as the holder of a bottomry bond executed and delivered to him by the master of the ship before the commencement of hostilities between Great Britain and France. Sir William Scott said:

"The integrity of this transaction is not impeached, but I am called upon to consider whether the court can, consistently with the principles of law that govern its practice, afford relief. It is the case of a bottomry bond, given fairly in times of peace, without any view of infringing the rights of war, to relieve a ship in distress. . . . But can the court recognize bonds of this kind as titles of property, so as to give persons a right to stand in judgment, and demand restitution of such interests in

a court of prize? . . . The person advancing money on bonds of this nature, acquires, by that act, no property in the vessel; he acquires the *jus in rem*, but not the *jus in re*, until it has been converted and appropriated by the final process of a court of justice. . . . But it is said that the captor takes *cum onere*, and, therefore, that this obligation would devolve upon him. That he is held to take *cum onere* is undoubtedly true, as a rule which is to be understood to apply where the onus is immediately and visibly incumbent upon it. A captor who takes the cargo of an enemy on board the ship of a friend, takes it liable to the freight due to the owner of the ship; because the owner of the ship has the cargo in his possession, subject to that demand by the general law, independent of all contract. . . . But it is a proposition of a much wider extent, which affirms that a mere right of action is entitled to the same favorable consideration in its transfer from a neutral to a captor. It is very obvious that claims of such a nature may be so framed as that no powers belonging to this court can enable it to examine them with effect. They are private contracts, passing between parties who may have an interest in colluding; the captor has no access whatever to the original private understanding of the parties in forming such contracts; and it is, therefore, unfit that he should be affected by them. His rights of capture act upon the property, without regard to secret liens possessed by third parties. . . . I am of opinion that there is no instance in which the court has recognized bonds of this kind as titles of property, and that they are not entitled to be recognized as such in the prize courts."

In *The Marianna*, the vessel had been sold at Buenos Ayres by American owners to a Spanish merchant; the purchase money, however, had not been paid in full, but was to be satisfied out of the proceeds of a quantity of tallow on board the vessel for sale, consigned to the agents of the American vendors at London. The vessel was seized on her voyage to England, documented as belonging to a Spanish merchant, and sailing under the flag and pass of Spain. The former American proprietors made claim to the cargo, but the claim was

disallowed because the claimants' interest was not sufficient to support it; and the court said:

"Captors are supposed to lay their hands on the gross tangible property, on which there may be many just claims outstanding, between other parties, which can have no operation as to them. If such a rule did not exist, it would be quite impossible for captors to know upon what grounds they were proceeding to make any seizure. The fairest and most credible documents, declaring the property to belong to the enemy, would only serve to mislead them, if such documents were liable to be overruled by liens which could not in any manner come to their knowledge. It would be equally impossible for the court, which has to decide upon the question of property, to admit such considerations. The doctrine of liens depends very much on the particular rules of jurisprudence which prevail in different countries. To decide judicially on such claims, would require of the court a perfect knowledge of the law of covenant, and the application of that law in all countries, under all the diversities in which that law exists. From necessity, therefore, the court would be obliged to shut the door against such discussions and to decide on the simple title of property, with scarcely any exceptions. . . . As to the title of property in the goods, which are said to have been going as the funds out of which the payment for the ship was to have been made. That they were going for the payment of a debt will not alter the property; there must be something more. Even if bills of lading are delivered, that circumstance will not be sufficient, unless accompanied with an understanding that he who holds the bill of lading is to bear the risk of the goods as to the voyage, and as to the market to which they are consigned; otherwise, though the security may avail *pro tanto*, it cannot be held to work any change in the property."

These cases were cited by Dr. Lushington in *The Ida* as settling the law. In that case, claim was made by a neutral merchant to a cargo of coffee which had been consigned to him by an enemy on the credit of certain advances, as security for payment of which bills of lading covering the cargo had been delivered to him. But the court declined to recognize the lien,

17118

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 245.

THE UNITED STATES, APPELLANT,

vs.

KLEINWORT SONS AND COMPANY, CLAIMANTS OF THE CARGO OF THE SPANISH BARK "CARLOS F. ROSES."

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

FILED MARCH 26, 1900.

(17118.)

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INDEX.

	Original.	Print.
Libel	1	1
Order for process	2	1
Service of process	3	1
Affidavit of F. H. Brumby, prize master	4	2
Standing interrogatories	5	2
Deposition of Ysidro Bettran Maristany	8	7
Claim for cargo	15	10
Test affidavit	16	10
Decree condemning vessel	19	12
Writ of venditioni exponas issued and returned	20	12
Order extending time for claimants of cargo to take and file further proofs	21	12
Order extending time for claimants of cargo to take and file further proofs	22	13
Motion to condemn cargo heard and submitted	23	13
Order that claimants of cargo recover proceeds of sale of same	24	13
Opinion	25	14
Assignment of errors	27	15
Petition and allowance of appeal	28	15
Order to send up original papers	29	16
Citation (copy)	30	16

	Original.	Print.
Affidavit of Charles Frederick Harcke	31	17
Exhibit A. Bill of exchange	36	19
B. Bill of exchange	38	20
C. Bill of lading	40	20
D. Bill of lading	41	21
E. Bill of lading	42	21
F. Bill of lading	43	21
G. Cablegram	44	22
H. Bill of lading	45	22
I. Bill of lading	46	23
J. Bill of lading	47	23
K. Bill of lading	48	24
L. Bill of lading	49	24
M. Bill of lading	50	25
N. Bill of lading	51	26
O. Bill of lading	52	26
P. Bill of lading	53	27
Q. Bill of lading	54	27
R. Invoice	55	28
S. Invoice	57	28
Affidavit of Charles Frederick Harcke	59	30
Exhibit Y. Bill of lading	61	30
X. Bill of lading	62	31
W. Bill of lading	63	31
V. Bill of lading	64	32
U. Bill of lading	65	32
T. Bill of lading	66	33
AA. Invoice	67	33
Z. Invoice	69	34
Affidavit of Charles Frederick Harcke	71	35
Exhibit C. F. H 1. Bill of lading	73	36
2. Bill of lading	74	36
3. Bill of lading	75	37
Clerk's certificate	76	37
Stipulation as to translations of Spanish documents and for addition to record	77	38
Exhibit A. Bill of exchange (translation)	78	38
B. Bill of exchange (translation)	79	38
C, D, E, and F. Bills of lading (translation)	80	38
T, U, and V, and 1. Bills of lading (translation)	81	39
W, X, Y, 2, and 3. Bills of lading (translation)	82	39
Z. Invoice (translation)	83	40
AA. Invoice (translation)	84	41
G. Cablegram (translation)	85	41
Manifest (translation)	86	42

1 In the district court of the United States, southern district of Florida.

UNITED STATES OF AMERICA
vs.
THE SPANISH SHIP "CARLOS F. ROSES." } Prize.

To the honorable James W. Locke, judge of the district court of the United States for the southern district of Florida:

The libel of Joseph N. Stripling, attorney of the United States for the southern district of Florida, who libels for the United States and for all parties in interest against the sailing vessel "Carlos F. Roses," her tackle, apparel, furniture, and cargo, in a cause of prize, alleges—

That pursuant to instructions from the President of the United States F. E. Chadwick, captain of the United States Navy, in and with the United States ship of war the "New York," her officers and crew, did, on the 17th day of May, in the year of our Lord one thousand eight hundred and ninety-eight, subdue, seize, and capture on the high seas, as prize of war, the said "Carlos F. Roses," with a valuable cargo on board of the same; and that the said ship and cargo have been brought into the port and harbor of Key West, in the State of Florida, where the same now are, within the jurisdiction of this court; and that the said vessel and cargo are lawful prize of war and subject to be condemned and forfeited to the United States as such.

Wherefore the said attorney prays that all persons having or claiming any interest in said vessel or cargo may, by the proper process of this court, be duly notified of the allegations and prayers of this libel and cited to appear and claim the same; that the nature, amount, and value of said cargo may be determined, and that, on proper proofs being taken and heard and all due proceedings being had, the said "Carlos F. Roses," together with her tackle, apparel, furniture, and cargo may, on

2 final hearing of this cause, by the definitive sentence and decree of this court, be condemned, forfeited, and sold as a prize of war and the proceeds distributed according to law.

J. N. STRIPLING,
U. S. Atty., S. D. of Florida.

* * * * * * *

Let attachment and motion issue as prayed, returnable the sixth day of June, 1898, A. D., at 10.30 a. m.

J. W. LOCKE, *Judge.*

* * * * * * *

(Endorsed:) United States vs. "Carlos F. Roses." Libel. Filed May 20, 1898. E. O. Locke, clerk.

3 Whereupon attachment issued as prayed to the marshal of said district, commanding him forthwith to seize and take into his possession said sailing vessel "Carlos F. Roses" and cargo, and her safely to hold until the further order of this court.

Which attachment was afterwards returned by said marshal duly executed, with his return thereon endorsed, and is on file in said clerk's office.

Also monition was issued to said marshal, commanding him forthwith to summon all persons having any interest in or to said sailing vessel "Carlos F. Roses" or cargo to appear before an admiralty session of said court on sixth day of June, A. D. 1898, at 10.30 a. m., and show cause, if any they have, why said decree shall not be rendered as prayed.

Which monition was by said marshal afterwards returned, duly executed, with his return endorsed thereon, and is on file in said clerk's office.

4 In the district court of the United States, southern district of Florida.

Spanish bark "Carlos F. Roses." Prize.

Frank H. Brumby, being duly sworn, says: My name is Frank H. Brumby; I am ensign, U. S. Navy, on board U. S. ship "New York;" that on the 17th day of May, A. D. 1898, the Spanish bark "Carlos F. Roses" was captured as a prize of war by the U. S. S. "New York," commanded by Capt. F. E. Chadwick; that said bark "Carlos F. Roses" was delivered by said Capt. Chadwick to Rear-Admiral Wm. T. Sampson (commanding North Atlantic squadron), together with documents and other papers found on said bark; that said bark "Carlos F. Roses," with said documents and papers aforesaid, were turned over to affiant as prize master, with instructions to proceed to Key West, Fla.

That the papers and documents this day delivered to the undersigned prize commissioner, at Key West, Fla., are the identical documents and papers pertaining to the said bark "Carlos F. Roses" delivered to him and that they are in the same condition as when delivered to him.

(sd) F. H. BRUMBY,
Ens., U. S. N.

Sworn to and subscribed before me this 20th day May, A. D. 1898.

(sd) WINN, *Comdr., U. S. N.,*
Prize Commissioner.

(Endorsed:) Affidavit prize master, bark "Carlos F. Roses." Filed May 20, 1898. E. O. Locke, clerk.

5 *Standing interrogatories*

established by the district court of the United States for the southern district of Florida to be administered in prize causes in said court to all persons who may be produced as witnesses to be examined in preparatorio.

1st interrogate. What is your name, where were you born, and where have you lived for the last seven years? Where do you now live, and how long have you lived in that place? To what prince or state, or to whom are you, or have you ever been, a subject? Are you a married man, and if married, where do your wife and family reside?

2d interrogate. Were you present at the time of taking and seizing the ship, or her lading, or any of the goods or merchandises concerning which

you are now examined? Had the ship concerning which you are now examined any commission; what, and from whom?

3d interrogate. In what place, latitude, or part, and when was the said ship and goods, concerning which you are now examined, taken and seized? Upon what pretence and for what reasons were they seized? Into what port were they carried, and under what colors did the said ship sail? What other colors had you on board, and for what reason had you such other colors? Was any resistance made at the time when the said ship was taken; and if yea, how many guns were fired, and by whom, and by what ship or ships were you taken? Was the ship or vessel by which you were captured a ship of war or a vessel acting without any commission, as you believe? Were any other, and what, ship in sight at the time of the capture?

4th interrogate. What is the name of the master or commander of the ship or vessel taken? How long have you known the said master, and who appointed him to the command of said vessel? Where did said commander take possession of her, at what time, and what was the name of the person who delivered the possession to the said master? Where doth he live? Where is the said master's fixed place of abode, and where doth he generally reside? How long has he lived there, where was he born, and of whom is he now a subject? Is he married? If yea, where does his wife and family reside?

5th interrogate. Of what burden is the vessel which has been taken? What was the number of her mariners, and of what country were the said seamen and mariners? Did they all come on board at the same port or at different ports, and who shipped or hired them, and when and where?

6th interrogate. Had you, or any of the officers or mariners belonging to the ship or vessel, concerning which you are now examined, any, and what, part, share, or interest in the said vessel or her lading? If yea, set forth who and what goods or interest you or they have? Did you belong to the said vessel at the time she was seized and taken? In what capacity did you belong to her? How long have you known her? When and where did you first see her, and where was she built?

7th interrogate. What is the name of the vessel? How long has she been so called? Do you know of any other name or names, and what are they, by which she has heretofore been called? Had she any passport or sea chart on board, and from whom? To what ports and places did she sail during her said voyage before she was taken? Where did her last voyage begin, and where was the said voyage to have ended? From what port and at what time, particularly from the last clearing port, did the said ship sail previously to the capture? Set forth all the ports to which she has sailed and at which she has touched and traded during her whole voyage out and home.

8th interrogate. What lading did the said vessel carry at the time of her first setting sail on her last voyage, and what sort of lading and goods had she on board at the time she was taken? When was the same put on board? Set forth the different species of lading and the quantity of each sort. Has any part of the cargo of said vessel been unladen since the commencement of her original voyage? If so, at what ports or places was it unladen? State the articles which were unladen.

9th interrogate. Who were the owners of the vessel at the time when she was seized? How do you know that they were owners at that time? Of what nation or country are such owners by birth? Where do they reside, and where do their wives and families reside? How long have they resided there? Where did they reside before, to the best of your knowledge? To whom are they subject? How long have the present owners been in possession, and of whom did they purchase?

10th interrogate. Was any bill of sale made, and by whom, to the aforesaid owners of said vessel? And if any such were made, in what month and year, and where, and in the presence of what witnesses? Was any, and what, engagement entered into concerning the purchase further than appears on the bill of sale? If yea, was it verbal or in writing? Where did you last see it, and what has become of it?

11th interrogate. Was the said lading put on board at one port and at one time or at several ports and at several times, and at what ports, by name? Set forth what quantities of each sort of goods were shipped at each port.

12th interrogate. What are the names of the respective laders or owners or consignees of said goods? What countrymen are they? Where do they now live and carry on their business? How long have they resided there? Where did they reside before, to the best of your knowledge? And where were the said goods to be delivered, and for whose real account, risk, or benefit? Have any one of the said consignees or shippers any, and what, interest in the said goods? If yea, whereon do you found your belief that they have such interest? Do you verily believe that at the *at the* time of the lading the cargo, and at the present time, and also if said goods shall be restored and unladen at the destined port, the goods did, do, and will belong to the same persons and to none others?

6 13th interrogate. How many bills of lading were signed for the goods seized on board the said ship? Were any of those bills of lading false or colorable, or were any bills of lading signed which were different in any respect from those which were on board the ship at the time she was taken? What were the contents of such other bills of lading, and what became of them?

14th interrogate. Are there in the United States of America any bills of lading, invoices, letters, or instruments relative to the ship and goods concerning which you are now examined? If yea, set forth where they are, and in whose possession, and what is the purport thereof, and when they were brought or sent to the United States.

15th interrogate. Was there any charter party signed for the voyage in which the ship concerning which you are now examined was seized and taken? What became thereof? When, where, and between whom was such charter party made? What were the contents of it?

16th interrogate. What papers, bills of lading, letters, or other writings were on board the ship at the time she took her departure from the last clearing port, before her being taken as prize? Were any of them burnt, torn, thrown overboard, destroyed or cancelled, or attempted to be concealed, and when, and by whom, and who was then present?

17 interrogate. Has the ship concerning which you are now examined been at any time, and when, seized as a prize, and condemned as such?

If yea, set forth into what port she was carried, and by whom, and by what authority or on what account she was condemned?

18th interrogate. Have you sustained any loss by the seizing and taking the ship concerning which you are now examined? If yea, in what manner do you compute such your loss? Have you already received any indemnity, satisfaction, or promise of satisfaction for any part of the damage which you have sustained or may sustain by this capture and detention, and when, and from whom?

19th interrogate. Is the said ship or goods, or any and what part, insured? If yea, for what voyage is such insurance made, and at what premium, and when, and by what persons, and in what country was such insurance made?

20th interrogate. In case you had arrived at your destined port, would your cargo, or any part thereof, on being unladen, have immediately become the property of the consignees or any other person, and whom? Or was the lader to take the chance of the market for the sale of his goods?

21st interrogate. Let each witness be interrogated of the growth, produce, and manufacture of what country and place was the lading of the ship or vessel concerning which you are now examined, or any part thereof.

22d interrogate. Whether all the said cargo, or any and what part thereof, was taken from the shore or quay, or removed or tran'shipped from one boat, barque, vessel, or ship to another? From what and to what shore, quay, boat, barque, vessel, or ship, and when and where, was the same so done?

23d interrogate. Are there in any other country, and where, or on board any and what ship or ships, vessel or vessels, other than the ship and vessel concerning which you are now examined, any bills of lading, invoices, letters, instruments, papers, or documents relative to the said ship or vessel and cargo, and of what nature are such bills of lading, invoices, letters, instruments, papers, or documents, and what are the contents? In whose possession are they, and do they differ from any of the papers on board, and in what particular do they differ?

24th interrogate. Were any papers delivered out of the said ship or vessel and carried away in any manner whatsoever? And when, and by whom, and to whom, and in whose custody, possession, or power do you believe the same now are?

25th interrogate. Was bulk broken during the voyage in which you were taken, or since the capture of the said ship? And when, and where, by whom, and by whose orders, and for what purpose, and in what manner?

26th interrogate. Were any passengers on board the aforesaid ship? Were any of them secreted at the time of the capture? Who were the passengers, by name? Of what nation, rank, profession, or occupation? Had they any commission? For what purpose and from whom? From what place were they taken on board, and when? To what place were they finally destined, and upon what business? Had any and which of the passengers any and what property, or concern, or authority, directly or indirectly, regarding the ship and cargo? Were there any officers, soldiers, or mariners secreted on board, and for what reason were they

secreted? Were any of the citizens of the United States on board, or secreted or confined, at the time of the capture? How long and why?

27th interrogate. Were and are all the passports, sea briefs, charter parties, bills of sale, invoices, and papers which were found on board entirely true and fair? Or are any of them false or colorable? Do you know of any matter or circumstances to affect their credit? By whom were the passports or sea briefs obtained, and from whom? Were they obtained for this ship only? And upon the oath or affirmation of the persons therein described, or were they delivered to or on behalf of the person or person' who appear to have been sworn, or to have affirmed thereto, without their ever having, in fact, make any such oath or affirmation? How long time were they to last? Was any duty or fee payable and paid for the same? And is there any duty or fee to be paid on the renewal thereof? Have such passports been renewed, and how often? And has the duty or fee been paid for such renewal? Was the ship in a port in the country where the passports and sea briefs were granted? And if not, where was the ship at the time? Had any person on board any let-pass or letters of safe-conduct? If yea, from whom and for
7 what business? Had the said ship any license or passport from any foreign power or authority during the voyage? If so, state from whom been obtained and for what purpose and use.

28th interrogate. Have you written or signed any letters or papers concerning the ship and her cargo other than those found on board and delivered to her captors? If yea, what was their purport, to whom were they written and sent, and what is become of them?

29th interrogate. Towards what port or place was the ship steering her course at the time of her being first pursued and taken? Was her course altered upon the appearance of the vessel by which she was taken? Was her course at all times, when the weather would permit, directed to the place or port for which she appears to have been destined by the ship's papers? Was the ship before or at the time of her capture sailing beyond or wide of the said place or port to which she was so destined by the said ship's papers? At what distance was she therefrom? Was her course altered at any and what time, and to what other port or place, and for what reason?

30th interrogate. By whom and to whom hath the said ship been sold or transferred, and how often? At what time and at what place and for what sum or consideration hath such sum or consideration been paid or satisfied? Was the sum paid or to be paid a fair and true equivalent? Or what security or securities have been given for the payment of the same, and by whom, and where do they live now? Do you know or believe, in your conscience, such sale or transfer has been truly made and not for thepurposes of covering or concealing the real property? Do you verily believe that if the ship should be restored she will belong to the persons now asserted to be the owners and to none others?

31st interrogate. What guns were mounted on board the ship, and what arms and ammunition were belonging to her? Why was she so armed? Were there on board any other, and what, arms and ammunition, and when and where they put on board; and by whom or by what authority or for what purpose or destination, and on whose account were they put on board.

32d interrogate. What is the whole which you know or believe, according to the best of your knowledge and belief, regarding the real and true property and destination of the ship and cargo, concerning which you are now examined at the time of the capture?

8 In the district court of the United States, in and for the southern district of Florida. In admiralty.

THE UNITED STATES OF AMERICA
vs.
SPANISH BARK "CARLOS F. ROSES." } Prize.

Deposition of Ysidro Bettran Maristany, a witness produced, sworn, and examined in preparatorio, on the 26th day of May, A. D. 1898, at the United States court-house, Key West, Florida, in said district, on the standing interrogatories established by the district court of the United States for the southern district of Florida, the said witness having been produced for the purpose of such examination in behalf of the captors of a certain ship or vessel called the "Carlos F. Roses" and her cargo.

1. To the first interrogatory deponent answers:

My name is Ysidro Bettran Maristany. I was born in Barcelona, Spain. In the last seven years I have been sailing on the high seas. I am a married man, and my wife and family resides in Barcelona, Spain. I am a subject of Spain.

2. To the second interrogatory deponent answers:

I was present at the time of the capture of the ship. The ship has a royal patent, issued by the Spanish Government.

9 3. To the 3d interrogatory deponent answers:

The ship was captured in the Bahama Channel, near Matternillos, Cuba. She was captured on the 17th day of May, A. D. 1898, at about 3 p. m. We were captured on account of the war between Spain and the United States. The ship sailed under the Spanish flag. We had no other colors on board. After capture we were brought into the port of Key West. We made no resistance to the capture. We were captured by the U. S. S. "New York." There were no other ships present at the time, but we afterwards saw some war ships.

4. To the 4th interrogatory deponent answers:

I am the master of the ship captured. I was appointed to the command of the vessel by P. Roses Valenti. I took possession of the ship about three years ago at Barcelona, Spain. The owner delivered the possession to me. The owner and his family live in Barcelona, Spain.

5. To the 5th interrogatory deponent answers:

The vessel is of 499 tons. She had 14 mariners, including myself. They were all Spaniards. They all came on board at Barcelona. I hired them.

6. To the 6th interrogatory deponent answers:

Neither myself or any of the crew had any interest in the ship or her cargo. I was captain of the vessel at the time she was seized. I have known the vessel about six years. I first saw her in Havana, Cuba. She was built in Italy.

7. To the 7th interrogatory deponent answers:

The vessel is named the "Carlos F. Roses." She has been called by that name about five years. She had another name, which was
10 "Teresa Feguras." She had no passports or sea charts on board.

Her last voyage began at Barcelona, and we then went to Montevideo, and from said last-named place we started for Havana, Cuba, when we *we* were captured as aforesaid.

8. To the 8th interrogatory deponent answers:

When we sailed from Barcelona we had on board a cargo of wine and salt. When we were captured we had on board a cargo of garlic and jerked beef. The same was put on board on or about the 13th day of March, 1898. We had on board nearly 6,000 kintals of jerked beef and about 19,800 bunches of garlic. The outward cargo was discharged at Montivedeo.

9. To the 9th interrogatory deponent answers:

The owner of the vessel at the time she was seized was F. Roses Valenti, to the best of my knowledge and belief. He is a Spaniard by birth. He and his family resides in Barcelona. They are Spanish subjects. The present owners have been in possession many years. I do not know from whom they purchased. The royal patent will show.

10. To the 10th interrogatory deponent answers:

I do not know anything about any bill of sale.

11. To the 11th interrogatory deponent answers:

The cargo was all put on board at Montivedeo, Arg. Rep., at one time.

11 12. To the 12th interrogatory deponent answers:

The persons who shipped the goods were Pla Gibernan & Co. I do not know the consignees. The shippers live in Montivedeo, and carry on their business in said place. The said goods were to be delivered at Havana subject to order. I do not know who the goods belong to.

13. To the 13th interrogatory deponent answers:

I signed four bills of lading for each kind of cargo. They are all true and correct.

14. To the 14th interrogatory deponent answers:

There are not in the United States, as far as I know, any bills of lading, invoices, letters, or instruments relative to the ship and her cargo.

15. To the 15th interrogatory deponent answers:

The ship was not sailing under a charter party.

16. To the 16th interrogatory deponent answers:

At the time we took our departure from the last clearing port we had a royal patent, muster roll, invoices, and bills of lading. All of the papers were delivered to the prize master. None of the papers were torn, burnt, or destroyed.

17. To the 17th interrogatory deponent answers:

The ship, not my knowledge, has ever been seized or condem'ed as a prize.

12 18. To the 18th interrogatory deponent answers:

I have lost my wages by the seizure of the ship. I have not received any indemnity or promise of indemnity for any loss which I have or may sustain by this capture.

19. To the 19th interrogatory deponent answers:
The ship and cargo are not insured, as far as I know.
20. To the 20th interrogatory deponent answers:
If I had arrived at the port of destination I do not know to whom the cargo would belong. The manifest simply shows that the cargo was to be delivered at Havana "to the order."
21. To the 21st interrogatory deponent answers:
The cargo was produced in Urugvay, S. A.
22. To the 22d interrogatory deponent answers:
All the cargo was taken on board from lighters at Montivedeo.
23. To the 23d interrogatory deponent answers:
I do not know if there are any bills of lading or other papers on board any other ship or in any country relating to the ship and cargo.
24. To the 24th interrogatory deponent answers:
The only papers delivered out of or carried away from the ship were those delivered to the prize master.
13 25. To the 25th interrogatory deponent answers:
The bulk of the cargo was not broken during the voyage, nor since the capture.
26. To the 26th interrogatory deponent answers:
There were no persons of any description on board said vessel at the time of her capture, except the crew and master.
27. To the 27th interrogatory deponent answers:
All the papers found on the vessel are entirely true and correct.
28. To the 28th interrogatory deponent answers:
I have not signed or written any papers or letters concerning the ship and her cargo since the capture.
29. To the 29th interrogatory deponent answers:
We were steering for Havana when the ship was captured. Her course was not altered upon the appearance of the vessel by which we were taken. Her course was at all times directed toward Havana. She was about 220 miles from Havana when captured.
30. To the 30th interrogatory deponent answers:
I do not know to whom or from whom the said ship has been transferred. If the ship should be restored I believe she would belong to the person named as the owner.
14 31. To the 31st interrogatory deponent answers:
There were no guns on board the said vessel and no arms or ammunition of any description except four old bayonets.
32. To the 32d interrogatory deponent answers:
I have already stated all that I know concerning the true property and destination of the said ship and her cargo.

YSIDRO BETTRAN MARISTANY.

Sworn to and subscribed before me May 26th, 1898.

J. W. PHIPPS,
U. S. Prize Commissioner.

(Endorsed:) United States vs. "Carlos F. Roses" & cargo. Deposition of Y. B. Maristany. In preparatorio. Filed May 26, 1898. E. O. Locke, clerk.

15 District court of the United States for the southern district of Florida.

THE UNITED STATES OF AMERICA,
against
THE BARK "CARLOS F. ROSES" AND HER CARGO. } In prize.

Herman Greverus Kleinwort and Alexander Drake Kleinwort, composing the copartnership firm of Kleinwort Sons & Company, of London, England, claim a shipment of 110,256 kilos of jerked beef and 19,980 strings of garlic, and a further shipment of 165,384 kilos of jerked beef, shipped on the said bark "Carlos F. Roses," as the true and lawful owners thereof under advances made by them upon the security of the bills of lading in the aggregate amount of £6,297 British sterling, equivalent to $30,644.35, the said shipments now being proceeded against in the above-entitled action, and the same not being lawful prize of war.

KLEINWORT, SONS & COMPANY.
By WM. A. FAIN.

WILHELMUS MYNDERSE,
G. BOWNE PATTERSON,
Proctors.

16 District court of the United States for the southern district of Florida.

THE UNITED STATES OF AMERICA,
against
THE BARK "CARLOS F. ROSES" AND HER CARGO. } Test affidavit.

COUNTY OF MONROE, STATE OF FLORIDA,
Southern District of Florida, ss:

William H. Fain, being duly sworn, deposes and says that he is a resident of the city of New York and a citizen of the United States of America.

Deponent further says that he is specially authorized to act for and on behalf of the copartnership firm of Kleinwort Sons & Company, of London, England, claimants of a shipment of 110,256 kilos of jerked beef and 19,190 strings of garlic and a further shipment of 165,384 kilos of jerked beef shipped on the said bark "Carlos F. Roses," to make claim therefor on their behalf.

Deponent further says, upon information and behalf, that the said firm of Kleinwort Sons & Company are merchants of the city of London; that said firm is constituted of Herman Greverus Kleinwort and Alexander Drake Kleinwort, both domiciled in London and both citizens and subjects of the United Kingdom of Great Britian and Ireland.

Deponent further says upon information and belief, that in the months of February and March, 1898, the said bark "Carlos F. Roses," being then in Montevideo, bound on a voyage to Havana, Cuba, took on
17 board a cargo of jerked beef and strings of garlic shipped by Pla Gibernau & Company, of Montevideo, to be transported to the said port of Havana, there to be delivered to the order of the shippers according to the conditions of certain bills of lading issued therefor by the said bark to the said Pla Gibernau & Company.

Deponent further says, upon information and belief, that the said ship-

pers Pla Gibernau & Company are merchants domiciled in, and citizens of the Argentine Republic.

Deponent further says that, being laden with the cargo aforesaid, the said bark set sail from Montevideo on the 16th day of March, 1898, and proceeded upon her voyage to Havana until the 17th of May, when she had reached a point in the Bahama Channel off Martinique, at which time and place she was captured by the United States cruiser "New York," without resistance on the part of the said bark, and thereupon the said cruiser "New York" put on board the said bark a prize master and crew who brought the said bark into this port of Key West, where she and her cargo have been libeled as prize of war.

Doponent further says, upon information and belief, that upon and after the shipment of the said cargo in Montevideo the claimants, copartners as aforesaid, long prior to the capture of the said bark and her cargo, made advances to the shippers and owners of said cargo in the sum of £6,297 British sterling, to wit, £2,714, item thereof, upon the security of the said lot of 110,256 kilos of jerked beef and 19,980 strings of garlic, and £3,583, item thereof, upon the security of the said lot of 165,384 kilos of jerked beef; that at the time of making said advances and in consideration of such advances, the said bills of lading covering said shipments were delivered to the claimants, duly
18 endorsed in blank with the intent and purpose that they should thereby take the title to said bills of lading and to the said shipments of jerked beef and garlic, and should, upon arrival of the said vessel at destination, take delivery of said shipments and hold the same as security for their said advances until paid, with full right to receive and possess and dispose of the said shipments and to apply the proceeds to the payment of their said advances; and accordingly the said Kleinwort Sons & Company did become and ever since have been and still are as aforesaid the true and lawful owners of the said bills of lading and of the shipments of jerked beef and garlic therein referred to.

Deponent further says that the said advances so as aforesaid made by the claimants in the amount of £6,297 British sterling were substantially in the estimated value of the said shipments and much in excess of their actual value in this port, and that the said sum is equivalent in money of the United States to about $30,644.35, and that no part of the same has been paid or otherwise secured to be paid.

Deponent further says that this affidavit is made by him upon information transmitted by cablegram, and that it is necessarily incomplete, and he prays leave, therefore, to supplement the same hereafter as justice may require.

Wherefore claim is made on behalf of said Kleinwort, Sons & Company to the aforesaid shipments, and it is averred on their behalf that the claimants were at the time of the capture of the said bark and her cargo the lawful owners of said shipments, and that the said shipments are not and never have been the subjects of lawful prize, and it is prayed that the same may be restored to the claimants.

W. H. FAIN.

Sworn to before me this 31st day of May, 1898.

J. OTTO, *Dy. Clerk.*

(Endorsed:) United States vs. "Carlos F. Roses." Claim of Kleinwort, Sons & Co. Filed May 31, 1898. E. O. Locke, clerk.

19 In the district court of the United States, southern district of Florida.

UNITED STATES
against
SPANISH BARK "CARLOS F. ROSES," AND CARGO.

This cause coming on to be heard upon the allegation of the libel and the claims of the master and owners of said cargo, and testimony taken in preparatorio, and it appearing that said vessel was enemy's prope'ty, and seized upon the high seas:

It is ordered, adjudged, and decreed that the said vessel be condemned and forfeited to the United States, and the marshal proceed to advertise and sell same and deposit the proceeds with the assistant treasurer of the United States at New York, in accordance with law; but the ownership of the cargo not satisfactorily appearing from the testimony in preparatorio, it is ordered that the claimants thereof have sixty days in which to file further proof of ownership; and it further appearing that said cargo is of a perishable nature, it is ordered that the marshal proceed to advertise and sell same and deposit the proceeds in accordance with law, to abide the further order and judgment of the court herein.

JAMES W. LOCKE, *Judge.*

KEY WEST, FLORIDA, *June 2nd, 1898.*

(Endorsed:) The United States vs. The Spanish bark "Carlos F. Roses" and Cargo. Decree. Filed June 2, 1898. E. O. Locke, clerk.

20 Whereupon a writ of vendi-tioni exponas was issued to the marshal commanding him forthwith after due advertisement to sell at public auction the said Spanish bark "Carlos F. Roses," her tackle, apparel, furniture, and cargo, and deposit the proceeds thereof in accordance with law.

Which writ was afterwards returned showing that in accordance therewith he had sold at public auction the said vessel for the sum of $1,310, and the cargo for the sum of $16,750, which sums he had deposited with the assistant treasurer of the United States at New York, subject to the order of said court.

Which writ with the return thereon endorsed, together with the vouchers for expenses, remain on file in the clerk's office.

21 District court of the United States for the southern district of Florida.

THE UNITED STATES OF AMERICA, LIBELLANTS,
against
THE BARK "CARLOS F. ROSES" AND HER CARGO.

The time for claimants of cargo to take and file their further proofs herein is hereby extended to and including August 31, 1898.

JAMES W. LOCKE, *Judge.*

We consent to the foregoing order.

WILHELMUS MYNDERSE,
For Claimants.

Rec'd copy of above July 28th, 1898.

J. N. STRIPLING, *U. S. Att'y.*

(Endorsed:) United States vs. bark "Carlos F. Roses" and her Cargo. Order extending time. Filed July 28, 1898. E. O. Locke, clerk.

22 District court of the United States, southern district of Florida.

UNITED STATES OF AMERICA, LIBELLANT,
against
THE BARK "CARLOS F. ROSES" AND HER CARGO.

The time of the claimants of cargo to take and file further proofs herein is hereby extended to and including October 15th, 1898.

Dated August 16, 1898.

JAMES W. LOCKE, *Judge.*

We consent to the foregoing order.

EDWARD K. JONES,
Special Counsel for U. S.

WILHELMUS MYNDERSE,
For Cargo.

(Endorsed:) United States vs. The Bark "Carlos F. Roses" and her cargo. Order extending time to file further proof until Oct. 15, 1898. Filed August 16, 1898. E. O. Locke, clerk.

23 THURSDAY, *February 2nd, 1898.*

Present: Honorable James W. Locke, judge.

UNITED STATES
vs.
SPANISH BARK "CARLOS F. ROSES" AND CARGO. } Prize.

Now comes the United States, by its attorney, Jos. N. Stripling, esq., and moves the court for the condemnation of the cargo of said vessel, which said motion is fully argued by F. M. Brown, esq., counsel for claimants, and Jos. N. Stripling, esq., counsel for the Government, and submitted.

(Minutes of said court, page 482, Series "A.")

24 United States district court, southern district of Florida.

THE UNITED STATES OF AMERICA
against
THE BARK "CARLOS F. ROSES" AND HER CARGO. } Prize.

This cause coming to be heard upon the claim of Kleinwort, Sons & Company, for the proceeds of sale of the cargo in this case, and having been fully heard by the testimony and further proof, and duly argued and submitted:

Upon consideration, it is ordered, adjudged, and decreed that the claim be allowed, and that the claimants have, receive, and recover the proceeds

of said sale, after the payment of all costs and expenses necessarily incurred in the case, custody, and preservation and sale of said property, and that a check be drawn for the amount of , such proceeds, upon the Assistant Treasurer of the United States, at New York, in full for such claim.

JAMES W. LOCKE, *Judge.*

JACKSONVILLE, FLORIDA, *February 8, 1899.*

25 United States district court, southern district of Florida.

THE UNITED STATES OF AMERICA
against
THE BARK "CARLOS F. ROSES" AND HER CARGO. } Prize.

Opinion.

This cargo, consisting of about 275,000 kilos of jerked beef and 20,000 strings of garlic, was shipped on board the vessel at Montevideo by Pla Gibernau & Company, on the 14th of March, 1898. The property was consigned upon three bills of lading to the order of the shippers, and bills of exchange, at ninety days, were drawn upon the claimants. The first of these, for £2,714, was drawn by the shippers, and the second, for £3,583, was drawn by the master in favor of the shipper. They were both cashed by the London and River Plate Bank, were presented to the claimants, and accepted by them on April 6th, and when due paid. At the time that these bills of exchange were accepted, one of the bills of lading, the one drawn by the shipper, came into the possession of the claimants; subsequently, the other one drawn by the master. They were forwarded to the claimants' agent in Havana for the purpose of collecting from the cargo upon its arrival the amount of advances by the claimants in paying such bills of exchange, but in the meantime the vessel was captured, the cargo never reached that city, and subsequently the endorsed bills of lading were returned to the claimants.

26 The only question is, In whom was the title and right of possession at the time of the capture? The possession of a properly endorsed bill of lading of a cargo for a valuable consideration is not only evidence of a jus in re, and right of property and possession of it, until such rights and claims are otherwise satisfied. This is a well-established and well-accepted principle of commercial law. From the time the first bill of lading was in the possession of the claimants—namely, the 6th of April, long before any declaration of war—they had the right to the property represented by it. It is true, the bill of lading representing the property against which the second bill of exchange was drawn—that drawn by the master—is not shown affirmatively to have reached the hands of the claimants at the same time, nor is the date at which it passed into their possession shown, but it is shown to have passed, upon being drawn by the master, into the hands of a neutral, the purchaser and shipper of the cargo, by them transferred to the claimants. Any transfer in title made between neutrals, even while the property is in transitu, can in no way effect the right of possession. It is only transfers or changes of title made between enemies and neutrals while property is in transitu which will not be recognized by prize courts.

It appears, therefore, satisfactorily from the proof that both the title and right of possession to the property was in a neutral at the time of the capture, as evidenced by the endorsed bills of lading and the paid bills of exchange presented at, and the claim is allowed, and it is so ordered.

(Endorsed:) United States vs. Bark "Carlos F. Roses." Order allowing claim of Kleinwort, Sons & Co. Filed Feb. 9, 1899. E. O. Lock.

27 In district court of United States, southern district of Florida.

UNITED STATES *vs.* THE "CARLOS F. ROSES" AND CARGO.	Claim of Kleinwort, Sons & Co.

And now comes the above-named plaintiff and appellant and makes assignments of error in respect of the decision and decree of the court, rendered herein on the 8th day of February, A. D. 1899, allowing the claim of the above-named claimants, Kleinwort, Sons & Company, and discharging the cargo of said vessel:

First. That the district court erred in holding that the cargo of jerked beef and garlic claimed by said claimants was not a lawful prize of war.

Second. That the district court erred in discharging said cargo of jerked beef and garlic and ordering the same restored to the said claimants.

Third. That the district court erred in holding that the said cargo of jerked beef and garlic claimed by the above-named claimants, was privileged and exempt from capture and condemnation as being property owned by neutrals.

Fourth. That the said district court erred in not holding that the cargo of jerked beef and garlic claimed by the above-named claimants was lawful prize of war and subject to condemnation.

J. N. STRIPLING,
U. S. Attorney.

(Endorsed:) United States vs. The "Bark Carlos F. Roses" and cargo. Claim of Kleinwort, Sons & Company. Assignments of errors. Filed Feb. 23, 1899. E. O. Locke, clerk.

28 In district court of the United States, southern district of Florida.

UNITED STATES *vs.* THE "CARLOS F. ROSES" AND CARGO.	Claim of Kleinwort, Sons & Company.

And now comes the plaintiff in the above cause, by J. N. Stripling, United States attorney for the southern district of Florida, considering itself aggrieved by the decision and decree of the court rendered herein on the eighth day of February, 1899, releasing the cargo of jerked beef and garlic set forth and described in the claim and test affidavit, and alleging error in the said decree, appears in open court and appeal therefrom to the Supreme Court of the United States. The said plaintiff

presents herewith an assignment of errors complained of, and thereupon prays that its said appeal may be allowed, and that the record may be duly certified to the Supreme Court of the United States, in accordance with the rules and practice in such case made and provided, to the end that the said appeal may be heard and determined by the said Supreme Court of the United States.

J. N. STRIPLING,
U. S. Attorney.

Upon reading and filing the foregoing notice and prayer of appeal and the assignment of errors the appeal of the said United States is hereby allowed.

Jacksonville, Fla., February 23, A. D. 1899.

JAMES W. LOCKE,
District Judge of the United States for the Southern District of Florida.

(Endorsed:) United States vs. The "Carlos F. Roses" and cargo. Claim of Kleinwort and Company. Notice of and order granting appeal. Filed Feb. 23, 1899. E. O. Locke, clerk.

29 District court of the United States, southern district of Florida.

THE UNITED STATES OF AMERICA,
vs.
THE SPANISH BARK "CARLOS F. ROSES" and Cargo. } Prize.

An appeal having been allowed and taken in this case and citation ordered, it is hereby ordered that, together with the transcript of record herein, the clerk of this court forward to the Supreme Court of the United States the original proofs and documents captured on this vessel.

Done and ordered at Jacksonville, Florida, this 20th day of March, A. D. 1899.

JAMES W. LOCKE, *Judge.*

Filed March 20th, 1899. E. O. Locke, clerk.

30 UNITED STATES OF AMERICA, ss.

To Kleinwort Sons & Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on April 5th, 1899, pursuant to an appeal filed in the clerk' office of the district court of the United States for the southern district of Florida, wherein the United States is libellant and appellant against the Spanish bark "Carlos F. Roses" and cargo, to show cause, if any there be, why the judgment in the said appeal mentioned, entered on the eighth day of February, 1899, should not be corrected, and speedy justice should not be done to the parties on that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the

Supreme Court of the United States, this eight' day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

[SEAL.] JAMES W. LOCKE,
U. S. District Judge.

Attest: E. O. LOCKE,
Clerk U. S. District Court, Southern District of Florida.

Due service of foregoing citation upon Kleinwort Sons & Co., claimants of cargo, is hereby admitted. March 14, 1899.

WILHELMUS MYNDERSE,
Proctor.

31 District court of the United States, southern district of Florida.

UNITED STATES OF AMERICA, LIBELLANTS,
vs.
THE BARK "CARLOS F. ROSES" AND HER CARGO. } In prize.

[Consular-General of the United States of America, City of London, England.]

I, Charles Frederick Harcke, of 20 Fenchurch street, in the city of London, manager to Messieurs Kleinwort Sons & Co., of the same place, merchants, make oath and say:

1. On or about the 14th day of March, 1898, Messieurs Pla Gibernau & Co., of Montevideo, in the Republic of Uruguay, shipped on board the above-named bark, "Carlos F. Roses," then lying at Montevideo, the following goods, viz: 110,256 kilos of jerked beef, 19,980 strings of garlic, 165,384 kilos of jerked beef.

2. On the 15th day of March, 1898, a bill of exchange payable at ninety days' sight for £2,714 13 8 was drawn by the said Messieurs Pla Gibernau & Co., upon the above-named Messieurs Kleinwort Sons & Co., to the order of the London and River Plate Bank, Limited, and on the 6th day of April, 1898, the said bill of exchange was accepted by the said Messieurs Kleinwort Sons & Co. The said bill was drawn in respect of the aforesaid 110,256 kilos of jerked beef and the said 19,980 strings of garlic, and is hereunto annexed and marked "A." On the 9th day
32 of May, 1898, the said draft was paid to the said London and River Plate Bank, Limited, as appears from the receipt endorsed thereon.

3. On the said 15th day of March, 1898, a bill of exchange for £3,583 11 6 at 90 days sight was drawn by Isidro Bertram Maristany upon the said Messieurs Kleinwort Sons & Co. to the order of the said Pla Gibernau & Co., and on the said 6th day of April, 1898, the said bill of exchange was accepted by them. The said bill of exchange was drawn in respect of the said shipment of 165,384 kilos of jerked beef, and is hereunto annexed and marked "B." On the 9th day of May, 1898, the said bill of exchange was paid to the London and River Plate Bank, Limited, to whom it had been endorsed by the payees. The said endorsement and payment appear on reference to the said bill of exchange.

4. At the time of the acceptance of the said bills of exchange, to-wit, on the 6th day of April, 1898, complete sets of bills of lading covering the

said shipments of 110,256 kilos of jerked beef and 19,980 strings of garlic were delivered over to the said Kleinwort Sons & Co. in consideration of their acceptance of said bill of exchange for £2,714 13 8 and as security to them for the liability incurred by them through their acceptance. The bills of lading for the 165,384 kilos of jerked beef were afterwards in like manner delivered over to the said Messieurs Kleinwort Sons & Co. in consideration of their acceptance of the said bill of exchange for £3,583 11 6 and as security to them for the liability incurred by them through their acceptance. The said bills of lading at the time of such delivery were duly endorsed in blank by Messi'urs Pla Gibernau & Co., the shippers of the said cargo, and to whose order the said cargo was by the terms of the bills of lading to be delivered, all with the intent and result of entitling Messieurs Kleinwort
33 Sons & Co. to the said bills of lading and to the cargo described therein as security for their acceptance.

This situation remained unchanged up to and including the 17th day of May, 1898, upon which date, as deponent is informed and believes, the said bark "Carlos F. Roses" and her cargo were captured as alleged prize.

The said cargo was ultimately destined for Don Pedro Pages, of Havana, who in the ordinary course of business would by payment to or indemnification of Kleinwort Sons & Co. or their agents in that behalf take up the said bills of lading and thus be enabled thereon to take the goods. No payment whatever has been made to Messieurs Kleinwort Sons & Co., or their agents, on account of the payments made by them through the said advances by said Don Pedro Pages, or by any person on his behalf or otherwise, and the said Kleinwort Sons & Co. have been and are wholly unindemnified in respect of their said payments except so far as the proceeds of the said cargo and the insurance thereon which as the owners of the said goods they have become entitled to collect, thereby subrogating to their own rights to the extent of such payments the insurers of the said goods.

5. The documents now produced to me and annexed to this my affidavit and marked "C," "D," "E," and "F" are respectively the bills of lading for the said 165,384 kilos of jerked beef.

6. The bills of lading and invoices for the 110,256 kilos of jerked beef and for the 19,980 strings of garlic were on the 9th day of April, 1898, sent by the said Messieurs Kleinwort Sons & Co. by post to Messieurs N. Gelak & Co., of Havana, bankers, who are the agents of the said Messieurs Kleinwort Sons & Co. there. The said Messieurs N. Gelak & Co. were at the same time advised of the acceptance of the aforesaid draft for £2,714 13 8, and they would in the ordinary course hold the
34 said documents until payment had been made by the consignee of the said goods. On the 17th day of June last a cablegram was sent by the said Messieurs Kleinwort Sons & Co. to the said Messieurs N. Gelak & Co., requesting them to return the documents enclosed to them as aforesaid, and in reply a cablegram was received that they had not been received. The original of the last-mentioned cablegram is now produced to me and marked "G." The said documents have not been received by the said Messieurs Kleinwort Sons & Co., and to the best of my knowledge and information and belief the same are lost. Certified copies of the bills of lading for the said 110,256 kilos of jerked beef and

19,980 strings of garlic have been obtained from the shippers, and the same are now produced to me and marked, respectively, "H," "I," "J," "K," "L," "M," "N," "O," "P," and "Q." The documents now produced to me and marked, respectively, "R" and "S" are true copies of the invoices of the said jerked beef and garlic, respectively. The bills of lading for the 165,384 kilos of jerked beef were not forwarded to Havana, but were retained by the said Messieurs Kleinwort Sons & Co., pending the disposal of the said cargo.

7. The said firm of Kleinwort Sons & Co. consist of Herman Greverus Kleinwort and Alexander Drake Kleinwort, who are both British subjects domiciled and carrying on a business within the United Kingdom of Great Britain and Ireland. I am the manager of the said firm, and as such the facts herein deposed to are within my personal knowledge, and I am duly authorized to make this affidavit on behalf of the said firm, the members of which are not personally acquainted with the various details herein deposed to.

C. F. HARCKE.

Sworn at the consulate-general of the United States of America at London, England, this 27th day of September, 1898, before me,
35 Francis W. Feigout, deputy consul-general of the United States of America, at London, England. [SEAL.]

(Endorsed:) United States of America vs. The Bark "Carlos F. Roses" and her cargo. Affidavit as to goods shipped by Pla Giberenau & Co. Filed Oct. 14. F. O. Locke, clerk.

36 This is the bill of exchange marked "A" referred to in the affidavit of Charles Frederick Harcke, sworn before me this 27th day of September, 1898.

Deputy Consul-General of the United States of America at London, England.

Received payment under discount from the acceptors, London, 9 May, '98, for the London and River Plate Bank, Limited, Hy K. Lunning, submangr. (40) Roofaryhy, chief accountant. No. 128. Montevideo, de Marzo de 1898. Por £2,714: 13: 8. A noventa dias vista se servirá Vd. mandar á pagar por esta primera de cambio (no habiéndolo hecho por la segunda ni la tercera), á la órden de The London River Plate Bank, Ld., la cantidad de dos mil setecientas catorce libras esterlinas 13″ 8′, valor recibido, que anotará Vds. en cuenta del S. Pedro Pages de la Habana, segun aviso.

PLA GIBERNAU SONS & CO.

A los Srs. KLEINWORT SONS Y CIA.,
Londres.

37 (Stamped on face:) D. 8 Jul. 98 A. (3 foreign revenue stamps). The London and River Plate Bank, Ltd., London, 9 Apr., 1898. Pla Gibernau & Ca., Montevideo. (Primera) (London and River Plate Bank, Limited. Montevideo B. R. 555). (Accepted 6 April, 1898. D. 96078. Payable at The London & Westminster Bank). (Kleinwort Sons & Co.) (The London & River Plate Bank, Limited, London (9238). (Kleinwort Sons & Co. A 61,908, London.) Pla Gibernau y Cia, Montevideo.

38 This is the bill of exchange marked "B" referred to in the affidavit of Charles Frederick Harcke, sworn before me this 27th day of September, 1898.

Deputy Consul-General of the United States of America at London, England.

No. 129. Montevideo, 15 de marzo de 1898. Por (8 Jul. 98) £3583:11:6. A noventa dias vista se servira Vds. mandar pagar por esta primera de cambio (no habiéndalo hecho por la segunda ni la tercua), á la órden de Pla. Gibernau y Cia. la cantidad de tres mil quinientas ochenta y tres libras esterlinas 11/6, Valor Factura carnetasajo por "Carlos F. Roses," que anotaran Vds. en cuenta del Sr. F. Roses Volenti de Baclona segum aviso *dc.*

YSIDRO BERTRAM MARISTANY.

A las SRS. KLEENWORT SONS Y CIA., *Londres.*

(Stamped on face:) (40) C. 8 Jul. 98 B. Three revenue stamps. The London and River Plate Bank. Limited. Primera. Pla Gibernau Cia. Accepted 6 April, 1898. C. 72692. Payable at The
39 London and Westminister Bank. Kleinwort Sons & Co.

London & River Plate Bank, Limited. B./R. 536. Montevideo. Primera. Kleinwort Sons & Co. (A 61,909) London. * * * The London & River Plate Bank, Limited, London (4239).

(Endorsed:) Pay the London & River Plate Bank, Limited, or order, Pla. Gibernau & Cia. Pla Gibernau & Ca., Montevideo. Received payment under discount from the acceptors. London, 9 May, 98 for London & River Plate Bank, Limited. Guy Z. Grimp, submanager. Bee Lauds, chief accountant.

40 This the bill of lading marked "C" referred to in the affidavit of Charles Frederick Harcke, sworn before me this 27th day of September, 1898.

FRANCIS W. FEIGOUT,
Deputy Consul-General of the United States of America, at London, England.

C.

Yo, el abajo firmado, capitan la barca española "Carlos F. Roses," que se halla surto y anclade en este puerto para seguir viaje al de Habana, declaro haber recibide y cargado dentro de dicho buque bajo de cubierta de los Sres. Pla Gibernau & Ca. per cuenta y riesgo de quien pertenezca lo siguiente: (165,384) ciento sesenta y cinco mil tres cientos ochenta y cuatro kilos carne tasojo, enjuto, bien acondicionado y marcado como al márgen, todo lo cual prometo y me obligo llevándome Dios en buen salvamento con dicho buque al citado puerto á entregar en los mismos terminos á la órden pagandome de flete, por cuenta de la expedición y para su cumplimiento obligo mi persona y bienes, buque, aparejos y flete. En fé de lo cual os di cuartro conocimientos de un tenor por mi firmados á solo efecto.

Dado en Monteviedo á 14 de marzo de 1898.

YSIDRO BERTRAM MARISTANY.

(Endorsed:) Pla Gibernau & Ca., Montevieclo. Pla Gibernau, J.

41 This is the bill of lading marked "D" referred to in the affidavit of Charles Frederick Harcke, sworn before me this 27th day of September, 1898.

FRANCIS W. FEIGOUT,
Deputy Consul-General of the United States of America,
at London, England.

D.

Yo, el abajo firmado, capitan la barca española "Carlos F. Roses," que se halla surto y anclado en este puerto para seguir viaje al de Habana, declaro haber recibido y cargado dentro de dicho buque bajo de cubierta de los Sres. Pla Gibernau & Ca., per cuenta y riesgo de quien pertenezca lo siguiente: (165,384) ciento sesenta y cinco mil tres cientos ochenta y cuatro kilos carne tasajo, enjuto, bien acondicionado y marcado como al márgen, todo lo cual prometo y me obligo llevándome Dios en buen salvamento con dicho buque al citado puerto á entregar en los mismos términos á la órden pagandome de flete, por cuenta de la expedición y para su cumplimiento obligo mi persona y bienes, buque, aparejos y flete. En fé de lo cual os di cuartro conocimientos de un tenor por mi firmados á solo efecto.

Dado en Montevideo, á 14 de marzo de 1898.

YSIDRO BERTRAM MARISTANY.

(Endorsed:) Pla Gibernau & Ca., Montevideo. Pla Gibernau, J.

42 This, the bill of lading marked "E," referred to in the affidavit of Charles Frederick Harcke, sworn before me this 27th day of September, 1898.

FRANCIS W. FEIGOUT,
Deputy Consul-General of the United States of America,
at London, England.

E.

Yo, el abajo firmado, capitan la barca española "Carlos F. Roses," que se halla surto y anclado en este puerto para seguir viaje al de Habana, declaro haber recibido y cargado dentro de dicho buque bajo de cubierta de los Sres. Pla Gibernau & Ca., cuenta y riesgo de quien pertenezca, lo siguiente: (165,384) Ciento sesenta y cinco mil tres cientos ochenta y cuatro kilos carne tasajo, enjuto, bien acondicionado y marcado como al márgen, todo lo cual prometo y me oblige llevándome Dios en buen salvamento con dicho buque al citado puerto á entregar en los mismos términos á la órden pagándome de flete por cuenta de la expedición y para su cumplimiento obligo mi persona y bienes, buque, aparejos y flete. En fé de lo cual os di cuartro conocimientos de un tenor *pro* mi firmados á solo efecto.

Dado en Montevideo, á 14 de marzo de 1898.

YSIDRO BERTRAM MARISTANY.

(Endorsed:) Pla Gibernau & Ca., Montevideo. Pla Gibernau, J.

43 This, the bill of lading marked "F," referred to in the affidavit of Charles Frederick Harcke, sworn before me this 27th day of September, 1898.

FRANCIS W. FEIGOUT,
Deputy Consul-General of the United States of America,
at London, England.

F.

Yo, el abajo firmado, capitan la barca española "Carlos F. Roses," que se halla surto y anclado en este puerto para seguir viaje al de Habana, declaro haber recibido y cargado dentro de dicho buque bajo de enbierta de los Sres. Pla Gibernau & Ca., cuenta y riesgo de quien perteneeza, lo siguiente: (165,384) Ciento sesenta y cinco mil tres cientos ochenta y cuatro kilos carne tasajo, enjuto, bien acondicionado y marcado como al márgen, todo lo cual promoto y me oblige llevándome Dios en buen salvamento con dicho buque al citado puerto á entregar en los mismos términos á la órden pagándome de flete por cuenta de la expedición y para su cumplimiento obligo mi persona y bienes, buque, aparejos y flete. En fé de lo cual os di cuartro conocimientos de un tenor *pro* mi firmados á solo efecto.

Dado en Montevicdeo, á 14 de marzo de 1898.

YSIDRO BERTRAM MARISTANY.

(Endorsed:) Pla Gibernau & Ca., Montevicdo. Pla Gibernau, J.

44 This is the cablegram marked "G" referred to in the affidavit of Charles Frederick Harcke, sworn before me this 27th day of September, 1898.

FRANCIS W. FEIGOUT,
Deputy Consul-General of the United States of America,
at London, England.

Form No. 2. Trans-Atlantic Cable Company No. .

No. Message, 85. Offices, London, 23 Royal Exchange, E. C.; 16 E. C.; 1 Northumberland avenue, W. C.; Liverpool, F 3 Exchange Buildings; Manchester, 18 Moult Street Cross street; Newcastle-on-Tyne, 29 Sandhill; Bradford, 8 Forster Square; Glaskow, 67 St. Vincent street and 40 Hope st.; Dundee, 37 Albert square; Edinburgh, 34c Frederick street; Leith, 5 Bernard street; Bristol, Carlton Chambers, Baldwin st.; Cardiff, Cory's Corner, Bute Docks; Swansea, 15 Adalaide st.; Western-Super-Mare, 12 Richmond st.; Waterville, Co. Kerry. The Commercial Cable Company, Atlantic Ocean, Mackay-Bennett System. Received via Bermuda-Commercial Company, 9 Jun., 98. tal Exchange, London, E. C.

Date . The following cablegram received "via Commercial Cables," at 6 W. a. m. From Habana. No. of words, 7. To Kleinwort Sons & Co.: No los hemos recibido. Gelak.

(In pencil:) (Docts. "Carlos F. Roses.")

No inquiry respecting this message can be attended to without the production of this paper. Repetitions of doubtful words should be obtained through the company's office and not by direct application to the sender.

45 This the bill of lading marked "H," refer'ed to in the affidavit of Charles Frederick Harcke, sworn before me this 27th day of September, 1898.

FRANCIS W. FEIGOUT,
Deputy Consul-General of the United States of America,
at London, England.

H.

Es copia del original.

Yo, el abajo firmado, capitan la barca española "Carlos F. Roses," que se halla surto y anclado en este puerto para seguir viaje al de Habana, declaro haber recibido y cargado dentro de dicho buque, bajo de cubierta de los Sres. Pla Gibernau & Ca., cuenta y riesgo de quien pertenezca, lo siguiente: (110,256) Ciento diez mil doscientos cincuenta y seis kilos carne tasajo, á granel; enjuto, bien acondicionado y marcado como al márgen, todo lo cual prometo y me oblige llevándome Dios en buen salvamento con dicho buque al citado puerto á entregar en los mismos términos á la órden pagándome de flete, siete reales fuertos, oro español, y 10% de capa por cada (46) cuarenta y seis kilos carne que entregue, y para su cumplimiento obligo mi persona y bienes, buque, aparejos y flete. En fé de lo cual os di cinco conocimientos de un tenor *pro* mi firmados á solo efecto.

Dado en Montevideo, á 14 de marzo de 1898.

Las cargadores, PLA GIBERNAU I CA., J.

(Endorsed:) Pla Gibernau, J.

(Stamp:) Spaña, en Montevideo.

46 This the bill of lading, marked "I," refer'ed to in the affidavit of Charles Frederick Harcke, sworn before me this 27th day of September, 1898.

FRANCIS W. FEIGOUT,
Deputy Consul-General of the United States of America, at London, England.

I.

(Es copia del original.)

Yo, el abajo firmado, capitan la barca española "Carlos F. Roses," que se halla surto y anclado en este puerto para seguir viaje al de Habana, declaro haber recibido y cargado dentro de dicho buque, bajo de cubierta de los Sres. Pla Gibernau & Ca., cuenta y riesgo de quien pertenezca, lo siguiente: (110,256) Ciento diez mil dos cientos cincuenta y seis kilos carne tasajo, enjuto, bien acondicionado y marcado como al márgen, todo lo cual prometo y me oblige llevándome Dios en buen salvamento con dicho buque al citado puerto á entregar en los mismos términos á la órden pagándome de flete siete reales fuertes, oro español, y 10 % de capa por cada (46) cuarenta y seis kilos carne que entregue, y para su cumplimiento obligo mi persona y bienes, buque, aparejos y flete. En fé de lo cual os di cinco conocimientos de un tenor *pro* mi firmados á solo efecto.

Dado en Montevideo, á 14 de marzo de 1898.

Los cargadores,

PLA GIBERNAU.

(Endorsed:) Pla Gibernau, J.

47 This the bill of lading, marked "J," referred to in the affidavit of Charles Frederick Harcke, sworn before me this 27th day of September, 1898.

FRANCIS W. FEIGOUT,
Deputy Consul-General of the United States of America, at London, England.

J.

(Es copia del original.)

Yo, el abajo firmado, capitan la barca española "Carlos F. Roses," que se halla surto y anclado en este puerto para seguir viaje al de Habana, declaro haber recibido y cargado dentro de dicho buque, bajo de cubierta de los Sres. Pla Gibernau & Ca., per cuenta y riesgo de quien pertenezca, lo siguiente: (110,256) Ciento diez mil dos cientos cincuenta y seis kilos carne tasajo (á granel), enjuto, bien acondicionado y marcado como al márgen, todo lo cual prometo y me oblige llevándome Dios en buen salvamento con dicho buque al citado puerto á entregar en los mismos términos á la órden pagándome de flete siete reales fuertes, oro español, y 10 % de capa por cada (46) cuarenta y seis kilos carne que entregue y para su cumplimiento obligo mi persona y bienes, buque, aparejos y flete. En fé de lo cual os di cinco conocimientos de un *de un* tenor por mi firmados á solo efecto.

Dado en Montevieclo, á 14 de marzo de 1898.

Las cargadores.

(Endorsed:) Pla Gibernau, J.

48 This the bill of lading, marked "K," referred to in the affidavit of Charles Frederick Harcke, sworn before me this 27th day of September, 1898.

FRANCIS W. FEIGOUT,
Deputy Consul-General of the United States of America,
at London, England.

(Es copia del original.)

Yo, el abajo firmado, capitan la barca española "Carlos F. Roses," que se halla surto y anclado en este puerto para seguir viaje al de Habana, declaro haber recibido y cargado dentro de dicho buque, bajo de cubierta de los Sres. Pla Gibernau & Ca., per cuenta y riesgo de quien pertenezca, lo siguiente: (110,250) Ciento diez mil doscientos cincuenta y seis kilos carne tasajo (á granel), enjuto, bien acondicionado y marcado como al márgen, todo lo cual prometo y me oblige llevándome Dios en buen salvamento con dicho buque al citado puerto á entregar en los mismos términos á la órden pagándome de flete siete reales fuertes, oro español, y 10 % de capa por cada (46) cuarenta y seis kilos carne que entregue, y para su cumplim'ento obligo mi persona y bienes, buque, aparejos y flete. En fé de lo cual os di cinco conocimientos de un *de un* tenor por mi firmados á solo efecto.

Dado en Monteviedo, á 14 de marzo de 1898.

Los cargadores, PLA GIBERNAU & Ca.

(Endorsed:) Pla Gibernau, J.

49 This the bill of lading, marked "L," referred to in the affidavit of Charles Frederick Harcke, sworn before me this 27th day of September, 1898.

FRANCIS W. FEIGOUT,
Deputy Consul-General of the United States of America,
at London, England.

(Es copia del original.)

Yo, el abajo firmado, capitan la barca española "Carlos F. Roses," que se halla surto y anclado en este puerto para seguir viaje al de Habana, declaro haber recibido y cargado dentro de dicho buque, bajo de cubierta de los Sres. Pla Gibernau & Ca., per cuenta y riesgo de quien pertenezca, lo siguiente: (110,256) Ciento diez mil doscientos cincuenta y seis kilos carne tasajo (á granel), enjuto, bien acondicionado y marcado como al márgen, todo lo cual prometo y me oblige llevándome Dios en buen salvamento con dicho buque al citado puerto á entregar en los mismos términos á la órden pagándome de flete siete reales fuertes, oro español, y 10 % de capa por cada (46) cuarenta y seis kilos carne que entregue, y para su complim'ento obligo mi persona y bienes, buque, aparejos y flete. En fé de lo cual os di cuartro conocimientos de un *de un* tenor por mi firmodos á solo efecto.

Dado en Montevi*edo* á 14 de marzo de 1898.

Los cargadores, PLA GIBERNAU.

(Endorsed:) to en este consulado de España; bueno para la legalización de los cinco firmas que anteceden de los Sres. Pla Gibernau y Ca. del comercio de esta plaza.

Montevideo, 21 de julio de 1898.

El consul de España. [STAMP.]

Montevideo
—— de órden 185
——— 57
Dros. in $3.00
——— 30
21 de julio 1898.

50 This the bill of lading marked "M" referred to in the affidavit of Charles Frederick Harcke, sworn before me this 27th day of September, 1898.

FRANCIS W. FEIGOUT,
Deputy Consul-General of the United States of America, at London, England.

(Es copia del original.)

Yo, el abajo firmado, capitan la barca española "Carlos F. Roses," que se halla surto y anclado en este puerto para seguir viaje al de Habana, declaro haber recibido y cargad*e* dentro de dicho buque, bajo de cubierta de los Sres. Pla Gibernau & Ca., per cuenta y riesgo de quien pertenezca, lo siguiente: (19,980) Diez y nueve mil novecient*os* ochenta ristras ajos, enjuto, bien acondicionado y marcado como al márgen, todo lo cual prometo y me oblig*e* llevándome Dios en buen salvamento con dicho buque al citado puerto á entregar en los mismos términos á la órden pagándome de flete ($0.06) seis centesimos, oro español, por *c*ada ristra que entregue, y para su cumplim'ento obligo mi persona y bienes, buque, aparejos y flete. En fé de lo cual os di cuartro conocimientos de un *de un* tenor por mi firmados á solo efecto.

Dado en Monteviedo, á 14 de marzo de 1898.

Los cargadores,

PLA GIBERNAU C, J.

(Endorsed:) Pla Gibernau, J.

(Stamp:) España en Montevideo, cor——.

51 This is the bill of lading marked "N" referred to in the affidavit of Charles Frederick Harcke, sworn before me this 27th day of September, 1898.

FRANCIS W. FEIGOUT,
Deputy Consul-General of the United States of America, at London, England.

N.

(Es copia del original.)

Yo, el abajo firmado, capitan la barca española "Carlos F. Roses," que se halla surto y anclado en este puerto para seguir viaje al de Habana, declaro haber recibido y cargado dentro de dicho buque, bajo de cubierta de los Sres. Pla Gibernau & Ca., per cuenta y riesgo de quien pertenezca, lo siguiente: (19,980) Diez y nueve mil novecientas ochenta ristras ajos, enjuto, bien acondicionade y marcado como al márgen, todo lo cual prometo y me obligo llevándome Dios en buen salvamento con dicho buque al citado puerto á entregar en los mismos términos á la órden pagándome de flete ($0.06) seis centesimos, oro español, por cada ristra que entregue, y para su cumplimiento obligo mi persona y bienes, buque, aparejos y flete. En fé de lo cual os di cuartro conocimientos de un tenor por mi firmados á solo efecto.

Dado en Montevideo, á 14 de marzo de 1898.

Los cargadores.

(Endorsed:) Pla Gibernau, J.

52 This is the bill of lading marked "O" referred to in the affidavit of Charles Frederick Harcke, sworn before me this 27th day of September, 1898.

FRANCIS W. FEIGOUT,
Deputy Consul-General of the United States of America, at London, England.

(Es copia del original.)

Yo, el abajo firmado, capitan la barca española "Carlos F. Roses," que se halla surto y anclado en este puerto para seguir viaje al de Habana, declaro haber recibido y cargado dentro de dicho buque, bajo de cubierta de los Sres. Pla Gibernau & Ca., per cuenta y riesgo de quien pertenezca, lo siguiente: (19,980) Diez y nueve mil novecientas ochenta ristras ajos, enjuto, bien acondicionado y marcado como al márgen, todo lo cual prometo y me obligo llevándome Dios en buen salvamento con dicho buque al citado puerto á entregar en los mismos términos á la órden pagándome de flete ($0.06) seis centesimos, oro español, por cada ristra que entregue, y para su cumplimiento obligo mi persona y bienes, buque, aparejos y flete. En fé de lo cual os di cuartro conocimientos de un tenor por mi firmados á solo efecto.

Dado en Montevideo, á 14 de marzo de 1898.

Los cargadores.

(Endorsed:) Pla Gibernau, J.

53 This is the bill of lading marked "P" referred to in the affidavit of Charles Frederick Harcke, sworn to before me this 27th day of September, 1898.

FRANCIS W. FEIGOUT,
Deputy Consul-General of the United States of America, at London, England.

(Es copia del original.)

Yo, el abajo firmado, capitan la barca española "Carlos F. Roses," que se halla surto y anclado en este puerto para seguir viajo al de Habana, declaro haber recibido y cargado dentro de dicho buque, bajo de cubierta de los Sres. Pla Gibernau & Ca., per cuenta y riesgo de quien pertenezca, lo siguiente: (19,980) Diez y nueve mil novencientas ochenta ristras ajos, enjuto, bien acondicionado y marcado como al márgen, todo lo cual prometo y me obligo llevándome Dios en buen salvemento con dicho buque al citado puerto á entregar en los mismos términos á la órden pagándome de flete ($0.06) seis centesimos, oro español, por cada riestra que entreger, y para su cumplimiento obligo mi persona y bienes, buque, aparejos y flete. En fé de lo cual os di cuartro conocimientos de un tenor por mi firmados á solo efecto.

Dade en Montevideo, á 14 de marzo de 1898.

Los cargardores.

(Endorsed:) Pla Gibernau, J.

54 This is the bill of lading marked "Z," referred to in the affidavit of Charles Frederick Harcke, sworn before me this 27th day of September, 1898.

FRANCIS W. FEIGOUT,
Deputy Consul-General of the United States of America, at London, England.

(Es copia del original.)

Yo, el abajo firmado, capitan la barca española "Carlos F. Roses," que se halla surto y anclado en este puerto para seguir viaje al de Habana, declaro haber recibido y cargado dentro de dicho buque, bajo de cubierta de los Sres. Pla Gibernau & Ca., por cuenta y riesgo de quien pertenezca, lo siguiente: (19,980) Diez y nueve mil novecientas ochenta ristras ajos; enjuto, bien acondicionado y marcado como al márgen, todo lo cual prometo y me obligo llevándome Dios en buen salvamento con dicho buque al citado puerto á entregar en los mismos términos á la órden pagándome de flete ($0.06) seis centesimos, oro español, por cada ristra que entregue, y para su cumplimiento obligo mi persona y bienes, buque, aparejos y flete. En fé de lo cual os di cuartro conocimientos de un tenor por mi firmados á solo efecto.

Dado en Montevideo, á 14 de marzo de 1898.

Las cargardores.

(Endorsed:) Pla Gibernau, J.

Vis. en este consulado de España.

Bueno para la legalización de la firma que antecede de las MM. Pla

Gibernau y Ca. del comercio de esta plaza. Montevideo, 21 de mar. de 1898.

MIN. DE CUCEM,
YM. CURDEUYES.

(Stamped:) Consulado de España; en mon oro.
Montevideo.
——— 186
——— 07
——— 300
——— 30

21 de ma. 1898.

55 This is the copy invoice marked "R," referred to in the affidavit of Charles Frederick Harcke, sworn before me this 27th day of September, 1898.

FRANCIS W. FEIGOUT,
Deputy Consul-General of the United States of America, at London, England.

R.

* * * * * * *

(Copia.)

PLA GIBERNAU AND CA.,
Montevideo:

Factura de 275,640 kilos carne tasajo á granel embarcado en la barca española "Carlos F. Roses," con destino á la Habana á la consignación de la órden por órden, cuenta y riesgo de los abajo anotados.

56 137,820 kilos carne tasajo á granel, $.9403 por % kils. $12,959.21
137,820 " " " " " .9534 " " " 13,139.76

275,640 kilos carne tasajo con 20 % mantas..... $26,098.97

GASTOS.

40 carradas paja para forro.....	$40.00	
34 tablas para forro.....	29.52	
viaje del capitan al saledero.....	30.00	
1 pieza arpillera para forro.....	10.00	
Telegramas á la Habana.....	51.96	
" " Barcelona.....	42.40	
" al saladero.....	3.00	
Corretage ½ %.....	130.49	
Reconocimiento 1 %.....	260.98	
		598.55
		26,697.32
W. comisión 3 %.....		800.92
S. E. O.		$27,498.24

CORRESPONDE.

60 % á la expedición del "Carlos F. Roses"..	165,384 kils.	$16,498.94
40 % á la Dn. Pedro Pages de la Habana....	110,256	10,999.30
	kils. 275,640	$27,498.24

Montevideo, 12 marzo 1898.

PLA, GIBERNAU & CA., *Montevideo.*

This is the copy invoice, marked "S," referred to in the affi-
57 davit of Charles Frederick Harcke, sworn before me this 27th day of September, 1898.

FRANCIS W. FEIGOUT,
Deputy Consul-General of the United States of America at London, England.

Viz:

(Copia.)

PLA GIBERNAU & CA.,
Montevideo:

Factura de 19,980 ristras ojas á granel embarcado en la barca española "Carlos Fco. Roses," con distino á la Habana á la consignación de la órden por órden, cuenta y riesgo de los abajo anatodos.

58	4,000 ristras ajos grandes, c. u. á $0.16.....	$640.00
	6,000 ristras ajos 1ª regulares, c. u. á $0.16.....	960.00
	9,980 ristras ajos 1ª regulares, c. u. á $0.15.....	1,497.00
	19,980 ristras ajos.....	3,097.00

GASTOS.

Permisos de embarque.....	$2.00	
Acarreo de 1 partida la banaco.....	6.00	
Lanchage de 1 partida.....	5.00	
10 jornales para atender el embarque.....	15.00	
		28.00
N. comisión 3 %.....		93.75
		121.75
S. E. ú O.....		3,218.75

CORRESPONDE.

A Dn. Pedro Pages, ristras.....	9,990	$1,609.37
A las que suscribera.....	9,990	1,609.38
	19,980	3,218.75

Montevideo, marzo 11 de 1898.
(Stamped:) Pla Gibernau & Ca., Montevideo.

59 United States district court, southern district of Florida.

UNITED STATES OF AMERICA, LIBELLANT,
vs.
THE BARK "CARLOS F. ROSES" AND HER CARGO. } In prize.

[Consulate-General of the United States of America, City of London, England.]

I, Charles Frederick Harcke, of 20 Fenchurch street in the city of London, manager to Messieurs Kleinwort Sons & Co., of the same place, merchants, make oath and say:

I refer to my previous affidavit sworn herein on the 27th day of September last, and I further say that since swearing the same, namely, on the sixth day of October, instant, the said Messrs. Kleinwort Sons & Co. received from Messrs. N. Gelak & Co., of Havana, enclosed in a letter dated 23rd September, 1898, the following document, that is to say: Three bills of lading for 110,256 kilos jerked beef, dated Montevideo, 14th March, 1898.

Three bills of lading for 19,980 strings garlic, dated Montevideo, 14th March, 1898.

Invoice for 275,640 kilos jerked beef, dated Montevideo, 12th March, 1898. Invoice for 19,980 strings garlic, dated Montevideo, 11th March, 1898.

The said documents are now produced to me and annexed hereto, and are respectively marked "T," "U," "V," "W," "X," "Y," "Z," and "Aa." No information or explanation is contained in the letter following the said documents as to how the same came into the possession of the said Messrs. N. Gelak & Co., but they appear to have done so on
60 or about the 17th September last, on which date they wrote to Messrs. Kleinwort Sons & Co., informing them that the said documents were in their hands.

C. F. HARCKE.

Sworn at the consulate-general of the United States of America at London, England, this 12th day of October, 1898, before me, Richard Westawtt, vice deputy consul-general of the United States of America, at London, England.

[SEAL.]

(Endorsed:) United States vs. "Carlos F. Roses." Affidavit verifying documents relating to goods shipped by Pla Gibernau & Co. Filed Oct. 24th, 1898. E. O. Locke, clerk.

61 This is the bill of lading marked "Y," referred to in the affidavit of Charles Frederick Harcke, sworn to before me this 12th day of October, 1898.

RICHARD WESTAWTT,
Vice and Deputy Consul-General of the United States of America, at London, England.

Y.

Yo, el abajo firmado, capitan la barca española "Carlos F. Roses," que se halla surto y anclado en este puerto para seguir viaje al de Habana, declaro haber recibido y cargado dentro de dicho buque, bajo de cubierta de los Sres. Pla Gibernau & Ca., per cuenta y riesgo de quien pertenezca, lo siguiente: (19,980) Diez y nueve mil novecientas ochenta riest'as ajos; enjuto, bien acondicionado y marcado como al márgen, todo lo cual prometo y me obligo llevándome Dios en buen salvamento con dicho buque al citado puerto á entregar en los mismos términos á la órden pagándome de flete seis centesimos de peso, oro español, por cada rist'a de ajos que entregue, y para su cumplimiento obligo mi persona y bienes, buque, aparejos y flete. En fé de lo cual os di cuatro conocimientos de un tenor por mi firmados á un solo efecto.

Dado en Montevideo, á 14 de marzo de 1898.

YSIDRO BERTRAM MARISTANY.

(Endorsed:) Pla Gibernau & Ca., Montevideo. Pla Gibernau, J.

62 This is the bill of lading marked "X," referred to in the affidavit of Charles Frederick Harcke, sworn before me this 12th day of October, 1898.

RICHARD WESTAWTT,
Vice and Deputy Consul-General of the United States of America, at London, England.

X.

Yo, el abajo firmado, capitan la barca española "Carlos F. Roses," que se halla surto y anclado en este puerto para seguir viaje al de Habana, declaro haber recibido y cargado dentro de dicho buque bajo de cubierta de los Sres. Pla Gibernau & Ca., per cuenta y riesgo de quien pertenezca, lo siguiente: (19,980) Diez y nueve mil novecientas ochenta riest'as ajos; enjuto, bien acondicionado y marcado como al márgen, todo lo cual prometo y me obligo llevándome Dios en buen salvamento con dicho buque al citado puerto á entregar en los mismos términos á la órden pagándome de flete seis centesimos de peso, oro español, por cada rist'a de ajos que entregue, y para su cumplimiento obligo mi persona y bienes, buque, aparejos y flete. En fé de lo cual os di cuatro conocimientos de un tenor por mi firmados á un solo efecto.

Dado en Montevideo, á 14 de marzo de 1898.

YSIDRO BERTRAM MARISTANY.

(Endorsed:) Pla Gibernau & Ca., Montevideo. Pla Gibernau, J.

63 This is the bill of lading marked "W," referred to in the affidavit of Charles Frederick Harcke, sworn before me this 12th day of October, 1898.

RICHARD WESTAWTT,
Vice and Deputy Consul-General of the United States of America, at London, England.

W.

Yo, el abajo firmado, capitan la barca española "Carlos F. Roses," que se halla surto y anclado en este puerto para seguir viaje al de Habana, declaro haber recibido y cargado dentro de dicho buque bajo de cubierta de los Sres. Pla Gibernau & Ca., per cuenta y riesgo de quien pertenezca, lo siguiente: (19,980) Diez y nueve mil novecientas ochenta riest'as ajos; enjuto, bien acondicionado y marcado como al márgen, todo lo cual prometo y me obligo llevándome Dios en buen salvamento con dicho buque al citado puerto á entregar en los mismos términos á la órden pagándome de flete seis centesimos de peso, oro español, por cada riest'a de ajos que entregue, y para su cumplimiento obligo mi persona y bienes, buque, aparejos y flete. En fé de lo cual os di cuatro conocimientos de un tenor por mi firmados á un solo efecto.

Dado en Montevideo, á 14 de marzo de 1898.

YSIDRO BERTRAM MARISTANY.

(Endorsed:) Pla Gibernau & Ca., Montevideo. Pla Gibernau, J.

64 This bill of lading marked "V," referred to in the affidavit of Charles Frederick Harcke, sworn before me this 12th day of October, 1898.

RICHARD WESTAWTT,
Vice and Deputy Consul-General of the United States of America, at London, England.

V.

Yo, el firmado, capitan la barca española "Carlos F. Roses," que se halla surto y anclado en este puerto para seguir viaje al de Habana, declaro haber recibido y cargado dentro de dicho buque bajo de cubierta de los Sres. Pla Gibernau & Ca., per cuenta y riesgo de quien pertenezca, lo siguiente: (110,256) Ciento diez mil doscientos cincuenta y seis kilos carne tasajo; enjuto, bien acondicionado y marcado como al márgen, todo lo cual prometo y me obligo llevándome Dios en buen salvamento con dicho buque al citado á entregar en los mismos términos á la órden pagándome de flete siete reales fuertes oro sellado y diez por ciento de capa por cada (46) cuarenta y seis kilos que entregue y para su cumplimiento obligo persona y bienes, buque, aparejos y flete firmados á un solo efecto.

Dado en Montevideo, á 14 de marzo 1898.

YSIDRO BERTRAM MARISTANY.

(Endorsed:) Pla Gibernau & Ca., Montevideo. Pla Gibernau.

65 This bill of lading marked "U," referred to in the affidavit of Charles Frederick Harcke, sworn before me this 12th day of October, 1898.

RICHARD WESTAWTT,
Vice and Deputy Consul-General of the United States of America, at London, England.

U.

Yo, el firmado, capitan la barca española "Carlos F. Roses," que se halla surto y anclade en este puerto para seguir viaje al de Habana, declaro haber recibido y cargado dentro de dicho buque bajo de cubierta de los Sres. Pla Gibernau & Ca., per cuenta y riesgo de quien pertenezca, lo siguiente: (110,256) Ciento diez mil doscientas cincuenta y seis kilos carne tasajo; enjuto, bien acondicionade y marcado como al márgen, todo lo cual prometo y me obligo llevándome Dios en buen salvamento con dicho buque al citado á entregar en los mismos términos á la órden pagándome de flete siete reales fuertes oro sellado y diez por ciento de capa por cada (46) cuarenta y seis kilos que entregue y para su cumpli*m*ento obligo persona y bienes, buque, aparejos y flete firmados á un solo efecto.

Dado en Montevideo, á 14 de marzo 1898.

YSIDRO BERTRAM MARISTANY.

(Endorsed:) Pla Gibernau & Ca., Montevideo. Pla Gibernau.

66 This bill of lading, marked "T," referred to in the affidavit of Charles Frederick Harcke, sworn before me this 12th day of October, 1898.

RICHARD WESTAWTT,
Vice and Deputy Consul-General of the United States of America, at London, England.

T.

Yo, el firmado, capitan la barca española "Carlos F. Roses," que se halla surto y anclado en este puerto para seguir viaje al de Habana, declaro haber recibido y cargado dentro de dicho buque bajo de cubierta de los Sres. Pla Gibernau & Ca., per cuenta y riesgo de quien pertenezca, lo siguiente: (110,256) Ciento diez mil doscientas cincuenta y seis kilos carne tasajo; enjuto, bien acondicionado y marcado como al márgen, todo lo cual prometo y me obligo llevándome Dios en buen salvamento con dicho buque al citado á *e*ntregar en los mismos términos á la órden pagándome de flete siete reales fuertes oro sellado y diez por ciento de capa por c*u*da (46) cuarenta y seis kilos que entregue, y para su cumpli*m*ento obligo persona y bienes, buque, aparejos y flete firmados á un solo efecto.

Dado en Montevideo, á 14 de marzo 1898.

YSIDRO BERTRAM MARISTANY.

(Endorsed:) Pla Gibernau & Ca., Montevideo. Pla Gibernau.

67 This is the invoice marked "Aa," referred to in the affidavit of Charles Frederick Harcke, sworn before me this 12th day of October, 1898.

RICHARD WESTAWTT,
Vice and Deputy Consul-General of the United States of America, at London, England.

68 Aa.

PLA GIBERNAU AND CA., *Montevideo.*

Factura de 19,980 ristras ajos á granel embarcado en la barca española "Carlos F. Roses," con destino á la Habana á la consignación de la órden por órden, cuenta y ri'sgo los abajo anotados.

4,000 ristras ajos grandes	á $0.16%		$640.00
6,000 " " 1ª rogulares "	0.16%		960.00
9,980 " " regulares "	0.15%		1,497.00
			3,097.00

GASTOS.

Permiso de embarque	$2.00	
Acarreo de una partida	6.00	
Lanchaje " "	5.00	
10 jornales para atender embarque	15.00	
		28.00
		$3,125.00
N. comisión 3%		93.75
		$3,218.75

S. E. ú O.

CORRESPONDE.

A Dn. Pedro Pages, ristras	9,990	$1,609.37
" las que suscriben "	9,990	1,609.38
Ristras	19,980	3,218.75

PLA GIBERNAU.

Montevideo, 11 marzo de 1898.

69 This is the invoice marked "Z," referred to in the affidavit of Charles Frederick Harcke, sworn before me this 12th day of October, 1898.

RICHARD WESTACOTT,
Vice and Deputy Consul-General of the United States of America, at London, England.

70 Z.

PLA GIBERNAU & CA., Montevideo.

Factura de 275,640 kilos carne embarcado en la bar'a española "Carlos F. Roses," con destino á la Habana á la consignación de la órden por órden, cuenta y riesgo de los abajo anotados.

137,820 kilos carne tasajo á granel $.9403 per % kils		$12,957.21
137,820 " " " " " .9534 " " "		13,139.76
275,640 kilos carne tasajo con 20% mantas		$26,098.97

GASTOS.

40 carradas paja para *porro*	$40.00	
34 tablas para *porro*	29.52	
Viajes del capitan al saladero	30.00	
1 pieza arpillera para forro	10.00	
Telegramas á la Habana	51.96	
" " Barcelona	42.40	
" al saladero	3.00	
Corretaje ½ %	130.49	
Reconocimiento 1 %	260.98	
		598.35
		$26,697.32
N. comisión, 3 %		800.92
		$27,498.24

E. E. i O.

CORRESPONDE.

60 % á la expedición del "Carlos F. Roses"	$165,384	kil. 16,498.94	
40 % " Dn. Pedro Pages de la Habana	110,256	" 10,999.30	
	Kils. 275,640	$27,498.24	

Montevideo, 12 marzo 1898.

PLA GIBERNAU C.

71 District court of the United States, southern district of Florida.

UNITED STATES OF AMERICA, LIBELLANT,
vs.
THE BARK "CARLOS F. ROSES" AND HER CARGO. } In prize.

[Consulate-General of the United States of America, City of London, England.]

I, Charles Frederick Harcke, of 20 Fenchurch street, in the city of London, manager to Messieurs Klienwort Sons & Co., of the same place, merchants, make oath and says:

I refer to my pre*i*rous affidavit sworn herein, and I further say that on the 18th day of October, instant, the said Messrs. Kleinwort Sons & Co. received from Messrs. N. Gelak & Co., of Havana, by letter from them, dated 4th day of October, 1898, three further bills of lading, namely, two dated 14th day of March, 1898, for 110,256 kilos of jerked beef, and one dated the said 14th day of *of* March, 1898, for 19,980 strings of garlic, all shipped by the above-named boat, "Carlos F. Roses," by Messrs. Pla Gibernau & Co., being portions of the cargo claimed in these proceedings by the said Messrs. Kleinwort Sons & Co. No information is given in the said letter of Messrs. N. Gelak & Co. as to the source from which the said documents came into their possession, but neither they or the other document already produced, relating to the said shipments of 110,256 kilos jerked beef and 19,980 strings carlic,

have since they were originally handed to the said Messrs. Kleinwort Sons & Co., in manner already deposed to been dealt with by them, except that the same were forwarded to Messrs. N. Gelak & Co.
72 by post, and I am unable to say where they have been in the meantime. The said documents are produced to me and annexed hereto and marked respectively, "C, F, H, 1," "C, F, H, 2," and "P, C, F, 3."

C. F. HARCKE.

Sworn at the consulate-general of the United States of America, at London, England, this 21st day of October, 1898, before me, Richard Westawtt, vice and deputy consul-general of the United States of America, at London, England. [SEAL.]

(Endorsed:) United States vs. "Carlos F. Roses." Further affidavit vérifying documents relating to goods shipped by Pla Gibernau & Co. Filed Nov. 7th, 1898. E. O. Locke, clerk.

73 This is the bill of lading marked "C. F. H. 1," referred to in the further affidavit of Charles Frederick Harcke.

RICHARD WESTAWATT,
Vice and Deputy Consul-General of the United States of America, at London, England.

C. F. H. 1.

(Stamped on face.)

Yo, el abajo firmado, capitan de la barca española "Carlos F. Roses," que se halla surto y anclado en puerto para seguir viaje al de Habana, declaro haber recibido y cargado dentro dicho buque, bajo de cubierta, de los Sres. Pla, Gibernau & Ca., por cuenta y riesgo de quien pertenez'a, lo siguiente: (110,256) Ciento diez doscientas concuenta y seis kilos carne tasajo; enjuto, bien acondicionado y marcado como al márgen, todo lo cual prometo y me obligo llevándome Dios en buen salvamento con dicho buque al citado puerto, á entregar en los mismos términos á la órden pagándome de flete siete reales fuertes rio sellado y *die y* diez por *cuento* de capa por *cada* (45) cuarenta y seis kilos que entregue, y para su cumplimiento obligo mi persona y bien's, buque, aparejos y flete. En fé de lo cual os di ..... conocimientos de un *au* tenor por mi firmados á un solo efecto.

Dado en Montevideo, á 14 de marzo de 1898.

ISIDRO BERTRAM MARISTANY.

(Endorsed:) Pla, Gibernau & Ca., Montevideo. Pla Gibernau, Ca. J.

74 This is the bill of lading marked "C. F. H. 2," referred to in the further affidavit of Charles Frederick Harcke.

RICHARD WESTAWATT,
Vice and Deputy Consul-General of the United States of America, at London, England.

C. F. H. 2.

(Stamped on face.)

Yo, el abajo firmado, capitan de la barca española "Carlos F. Roses," que se halla surto y anclado en puerto para seguir viaje al de Habana,

declaro haber recibido y cargado dentro dicho buque, bajo de cubierta, de los Sres. Pla, Gibernau & Ca., por cuenta y riesgo de quien pertenez'a, lo siguiente: (110,256) Ciento diez mil doscientas cincuenta y seis kilos carne tasajo; enjuto, bien acondicionado y marcado como al márgen, todo lo cual prometo y me obligo llevándome Dios en buen salvamento con dicho buque al citado puerto, á entregar en los mismos términos á la órden pagándome de flete siete reales fuertes rio sellado y diez por ciento de capa por cada (46) cuarenta y seis kilos que entregue y para su cumplimiento obligo mi persona y bien's, buque, aparejos y flete. En fé de lo cual os di.....conocimientos de un *un* tenor por mi firmados á un solo efecto.

Dado en Montevideo, á 14 de marzo de 1898.

ISIDRO BERTRAM MARISTANY.

(Endorsed:) Pla, Gibernau & Ca., Montevideo. Pla Gibernau Ca., J.

75 This is the bill of lading marked "C. F. H. 3," referred to in the further affidavit of Charles Frederick Hareke.

RICHARD WESTAWATT,
Vice and Deputy Consul-General of the United States of America, at London, England.

C. F. H. 3.

Yo, el abajo firmado, capitan de la barca española "Carlos F. Roses," que se halla surto y anclado en puerto para seguir viaje al de Habana, declaro haber recibido y cargado dentro dicho buque, bajo de cubierta, de los Sres. Pla, Gibernau & Ca., por cuenta y riesgo de quien pertenez'a, lo siguiente: (19,980) Diez y nueve mil novecientas ochenta rastias ajos; enjuto, bien acondicionado y marcado como al márgen, todo lo cual prometo y me obligo llevándome Dios en buen salvamento con dicho buque al citado puerto, á entregar en los mismos términos á la órden pagándome de flete seis centesimos de peso, oro español, por cada riest'a de ajos que entregue, y para su cumplimiento obligo mi persona y bien's, buque, aparejos y flete. En fé de lo cual os di.....conocimientos de un *un* tenor por mi firmados á un solo efecto.

Dado en Montevideo, á 14 de marzo de 1898.

ISIDRO BERTRAM MARISTANY.

(Endorsed:) Pla, Gibernau & Ca., Montevideo. Pla Gibernau Ca., J.

76 United States district court, southern district of Florida. In admiralty.

I, Eugene O. Locke, clerk of the said court, hereby certify that the foregoing pages numbered from one to seventy-five, inclusive, is a transcript of the record and copy of the papers and evidence on file in my office in the case of the United States vs. the "Carlos F. Roses" & cargo, prize, lately adjudicated in the said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Jacksonville, in said district, this twenty-first day of March, A. D. 1899.

[SEAL.] EUGENE O. LOCKE, *Clerk.*

77 In the Supreme Court of the United States, October term, 1899.

THE UNITED STATES, APPELLANT,
against
KLEINWORT SONS & COMPANY, CLAIMANTS OF the cargo of the "Carlos F. Roses." } No. 243.

Stipulation.

It is hereby stipulated and admitted that the following translations of the Spanish documents in the record in this case are correct, and that the translation of a portion of the manifest of the cargo, which manifest was not included in the record or sent up with the other original exhibits in this case, is correct and is proper to be inserted in the record.

HENRY M. HOYT,
Assistant Attorney-General.
WILHELMUS MYNDERSE,
Counsel for claimant.

Dated October 30, 1899.

78 *Body of Exhibit A, annexed to Hawke's affidavit of September 27th, 1898.*

(Bill of Exchange for £2,714 13s. 8d.)

No. 128. Montevideo, March 15, 1898. For £2,714 13 8.

Ninety days after sight you will please pay for this first of exchange (the second and third being unpaid), to the order of the London River Plate Bank, L'd, the sum of £2,714 13 8, value received, which you will charge to the account of Pedro Pagés, of Havana, as per advice.

PLA GIBERNAU & Co.

To Messrs. KLEINWORT SONS & Co., *London.*

79 *Body of Exhibit B, annexed to Hawke's affidavit of September 27th, 1898.*

(Bill of Exchange for £3,583 11s. 6d.)

No. 129. Montevideo, March 15, 1898. For £3,583 11 6.

Ninety days after sight you will please pay for this first of exchange (the second and third being unpaid), to the order of Pla Gibernau & Co., the sum of £3,583 11 6 invoice value of jerked beef, per "Carlos F. Roses;" which you will charge to the account of P. Roses Valenti, of Barcelona, as per advice.

YSIDRO BERTRAN MARISTANY.

To Messrs. KLEINWORT SONS & Co., *London.*

80 *Body of Exhibits C, D, E, and F, annexed to Hawke's affidavit of September 27, 1898.*

(Bill of lading for 165,384 kilos of jerked beef.)

I, the undersigned, captain of the Spanish barque "Carlos F. Roses," now lying and anchored in this port, with destination for Havana,

declare that I have received and loaded on said vessel below decks, from Messrs. Pla Gibernau & Co., for account and risk of whom it may concern the following:

165,384 kilos of jerked beef, dry, in good condition, and marked as in the margin, all which I promise and bind myself, God bringing me safely with the said vessel to the said port, to deliver in the same condition to order, upon payment to me of freight on account of the shipment, and for the execution of this I bind myself personally, my property, vessel, appurtenances, and freight. In witness whereof I have given four bills of lading of the same tenor, signed by me, one of which being accomplished the others to stand void.

Given at Montevideo, March 14, 1898.

ISIDRO BERTRAN MARISTANY.

(Endorsed:) Pla Gibernau & Co., Montevideo.

81 *Body of Exhibits T, U, and V, annexed to Hareke's affidavit of October 12, 1898, and of Exhibit C. F. H. 1, annexed to Hareke's affidavit of October 19th.*

(Bill of lading for 110,256 kilos of jerked beef.)

I, the undersigned, captain of the Spanish barque "Carlos F. Roses," now lying and anchored in this port, with destination for Havana, declare that I have received and loaded on said vessel below decks, from Messrs. Pla Gibernau & Co., for account and at the risk of whom it may concern the following:

In bulk. 110,256 kilos of jerked beef, dry, in good condition, and marked as in the margin, all which I promise and bind myself, God bringing me safely with the said vessel to the said port, to deliver in the same condition to order, upon the payment of 7 reals in gold as freight and 10% as charges on every 46 kilos that I deliver. And for the execution of the same I bind my person, property, vessel, appurtenances, and freight. In witness whereof I have given five bills of lading of the same tenor, signed by me, one of which being accomplished the others to stand void.

Given at Montevideo, March 14, 1898.

YSIDRO BERTRAN MARISTANY.

(Endorsed:) Pla Gibernau & Co.

NOTE.—The body of exhibits H, I, K, and L, annexed to Hareke's affidavit of September 27th, and purporting to be copies of the original bills of lading, are in the same language, but carry the date of March 12th and do not carry the signature of the master, and they are attested by the signature of Pla Gibernau & Co., shippers.

82 *Body of Exhibits W, X, and Y, annexed to Hareke's affidavit of October 12, 1898, and of Exhibits C, F, H, 2, and C, F, H, 3, annexed to Hareke's affidavit of October 19th, 1898.*

(Bill of lading for 19,980 bunches of garlic.)

I, the undersigned, captain of the Spanish barque "Carlos F. Roses," now lying and anchored in this port, with destination for Havana, declare that I have received and loaded on said vessel, below decks, from Messrs.

Pla Gibernau & Co., for account and at the risk of whom it may concern, the following:

19,980 bunches of garlic, dry, in good condition, and marked as in the margin; all which I promise and bind myself, God bringing me safely with the said vessel to the said port, to deliver, in the same condition, to order, upon the payment to me, as freight, of six cents in Spanish gold for every bunch of garlic that I deliver; and for the execution of this I bind my person, property, vessel, appurtenances, and freight.

In witness whereof I have given five bills of lading of the same tenor, signed by me, one of which being accomplished, the others to stand void.

Given at Montevideo, March 14, 1898.

YSIDRO BERTRAN MARISTANY.

(Endorsed:) Pla Gibernau & Co.

NOTE.—The body of Exhibits M, N, O, P, and Q, annexed to Hareke's affidavit of September 27th, and purporting to be copies of the original bills of lading, are in the same language, but carry the date of March 12th, and do not carry the signature of the master, and they are attested by the signatures of Pla Gibernau & Co., shippers.

83 *Body of Exhibit Z, annexed to Hareke's affidavit of October 12, 1898.*

Invoice of 275,640 kilos of jerked beef in bulk, shipped on the barque "Carlos F. Roses," and bound to Havana, consigned to order for account and risk, and by order of the parties noted below:

137,820 kilos jerked beef, 9403 % kilos		12,959.21
137,820 " " " 9534 % "		13,139.76
275,640 " " " in bulk		26,098.97
Expenses:		
40 bales hay for cover	40.	
34 boards " "	29.52	
Trip of captain to salting place	30.00	
1 piece cloth for cover	10.00	
Telegrams to Havana	51.96	
" " Barcelona	42.40	
" " salting place	3.	
Brokerage ½ %	130.49	
Inspection 1 %	260.98	
		598.35
		26,697.32
Our commission 3 %		800.92
		27,498.24

E. & O. E.

Account of—			
60 % to the expedition or voyage of the "Carlos F. Roses"	165,384	kilos	16,498.94
40 % to Mr. Pedro Pagés, of Havana	110,256		10,999.30
	275,640	"	27,498.24

Montevideo, March 12, 1898. Pla Gibernau & Co.

NOTE.—The foregoing is also a translation of Ex. R, annexed to Harcke's affidavit of September 27, purporting to be a copy of the original invoice.

84 *Body of Exhibit A, A, annexed to Harcke's affidavit of October 12th, 1898.*

Invoice of 19,980 strings of garlic in bulk, shipped on the barque "Carlos F. Roses," bound to Havana, consigned to order for account and risk, and by order of the parties noted below.

4,000 strings garlic, large, at 0.16			640
6,000 " " 1st regular, 0.16			960
9,980 " " regular, at 0.15			1,497
19,980 " " in bulk			3,097
Expenses:			
Permit		2	
Cartage of one lot		6	
Lighterage " "		5	
10 days watching vessel		15	
		—	28
			3,125
Our commission, 3 per cent			93.75
			3,218.75

E. & O. E.

Account of—

Mr. Pedro Pagés, strings, 9,990		1,609.37
Of the undersigned, " 9,990		1,609.38
Strings	19,980	3,218.75

Montevideo, March 11, 1898. Pla Gibernau & Co.

NOTE.—The foregoing is also a translation of Exhibit S annexed to Harcke's affidavit of September 27, 1898, purporting to be a copy of the original invoice.

85 *Body of Exhibit G annexed to Harcke's affidavit of September 27, 1898.*

[Cablegram.]

JUNE 9, 1898.

From Havana to Kleinwort Sons & Co., London.

We have not received them.

GELAK.

86 *Portions of manifest of cargo, omitting formal parts and unfilled blanks.*

Class and name of the vessel: "Carlos F. Roses."
Tonnage: 499.
Flag: Spanish.
Registration: Barcelona.
Number of crew: 14.

Manifest which I, Ysidro Bertran Maristany, captain of the said vessel, proceeding from Montevideo, with destination for Havana and stopping places, present, signed by me, and visé̊d by the consul at Montevideo.

For Havana and stopping places.
In bulk: 248,076 kilograms of jerked beef.
" 19,980 bunches of garlic, 29,970 kilos.
Shipped at Montevideo. Consignees.
Shipped by Pla Gibernau Co. To order.
Signed at Montevideo, March 15, 1898.

(Signed) YSIDRO BERTRAN MARISTANY.

Visé̊d in this consulate of Spain. Good for Havana, with a cargo of jerked beef and garlic.
Montevideo, March 14, 1898.

JOSÉ CALABAYUD,
Consul of Spain.

87 (Indorsed:) Supreme Court of United States. October term, 1899. The United States against Kleinwort Sons & Co., claimants of cargo of "Carlos F. Roses." Stipulation and exhibits. Dated October 30, 1899.

88 (Indorsed:) File No., 17,338. Supreme Court U. S. October term, 1899. Term No., 243. The United States, appellant, vs. Kleinwort Sons & Co., claimants, &c. Stipulation and addition to record. Filed Oct. 31, 1899.

(Indorsement on cover:) File No., 17,338. S. Florida D. C. U. S. Term No., 243. The United States, appellant, vs. Kleinwort Sons & Company, claimants of the cargo of the Spanish bark "Carlos F. Roses." Filed March 29, 1899. Received office Supreme Court of U. S. Mar. 24, 1899.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE UNITED STATES, APPELLANT,
v.
KLEINWORT SONS & CO., CLAIMANTS of the cargo of the Spanish bark *Carlos F. Roses.* } No. 243.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

ADDITIONAL BRIEF FOR THE UNITED STATES AND THE CAPTORS.

A.—*The form and character of the further proof.*

The further proof consists of mere *ex parte* affidavits of the manager of the claimant firm (Record, pp. 17, 30, 35). Appended to them are the bills of exchange, the bills of lading—originals and copies or duplicates—and the invoices, shown on pages following those cited. The affidavits state only the facts which show a *prima facie*

claim and are favorable to the claimants, and do not refer to the relations, transactions, or correspondence which must be presumed to have existed and passed between the claimants and the ultimate enemy owners of the cargo. In other words, they amount simply to the assertion that the bills of lading were indorsed over to the claimants in consideration of their acceptance of the bills of exchange, and as security for the liability thereon, with the intent and result of entitling the claimants to the bills of lading and to the cargo described therein. But a submission of all the circumstances involved would have enabled the court to distinguish and settle the real facts and resulting interests and titles according to the legal rights shown to exist. There must have been pertinent facts affecting, for instance, the previous connection between the enemy vessel owner, Valenti (who was also interested in the cargo, if not sole owner thereof), and showing the basis in credits or responsibility, of his dealings with the claimants. To say this is not necessarily to impugn the good faith or *bona fides* of the claimants, but to point out that the essence of their proof is sparse and bare. As to the form thereof, it is true that in the letter of Sir William Scott and Sir John Nicoll to Mr. Jay (Upton's Maritime Warfare and Prize, p. 471), it is stated in accordance with what seems to have been a common practice at an early day, rather than later or now, that "further proof usually consists of affidavits made by the asserted proprietors of the goods, in which they are sometimes joined by their clerks and others acquainted with the transaction;" in corroboration

of which affidavits, correspondence, invoices, etc., may be annexed. But the letter also states that in cases of suspicion and importance the court may order "plea and proof" instead of admitting affidavits and documents introduced by the claimants only, under which it appears witnesses were examined upon interrogatories or their depositions taken in writing under a commission issued for that purpose; although "this solemn method is not often resorted to."

Justice Story's statement is that "where further proof is ordered, affidavits taken in foreign countries before notaries public, whose attestations are properly verified, are in general proper evidence; but in the Supreme Court of the United States it is by rule of the court required that all such evidence shall be taken under a commission from the court;" citing *The London Packet*, 2 Wheat., 371. (Story's Principles and Practice of Prize Courts, pp. 23, 58; Rule 12 of the Supreme Court.) This rule was adopted at February term, 1817, with special reference to prize, as shown by the case of *The London Packet, supra*. The report shows that counsel for the claimant "offered to read affidavits as further proof which had not been taken under a commission, but they were rejected by the court. The cause was continued to the next term and the further proof ordered to be taken under a commission according to the rule of court of the present term." The rule was originally adopted at February term, 1817, and appears on the unnumbered page next preceding page 1 of the second volume of Wheaton's Reports (Brightly's notes).

The case of *The Frances* (8 Cr., 348) recognized affidavits produced on the order for further proof, although perhaps doubtfully, because they were "too positive to be disregarded without considerable reluctance and hesitation." This case also shows that the court expects full proof and the best proof of all the circumstances, and regards an unexplained omission in this respect as leading to condemnation.

Here, while the affidavit does not refer to letters which are not produced, nevertheless it might have brought forward the negotiations and instructions which must naturally have passed between Valenti, Pages, the neutral shippers, and the London bankers, and, we contend, should have done so.

In *The Magnus* (1 Rob., 31) further proof was required to be by plea and proof, but the court says that if it had been ordered only in general terms, a mere test affidavit and bare attestations would not have been satisfactory. "The correspondence of the parties, the orders for purchase, and the mode of payment would have been the points to which the court would have looked for satisfaction." The form of proof offered, whether by mere affidavit or by some form of argumentative pleading not amounting to proper further proof, is stated by the court to be "less than ordinary proof." Therefore the court declined to allow a second order for further proof to the claimant. "And where such further proof is admissible, it should, in general, be open to both parties, and always be by depositions and written evidence." (Story, circuit justice, in *The George*, 2 Gall., 249.)

In *The Adriana* (1 Rob., 313), further proof on behalf

of the claimants having been brought in, it was attempted to introduce affidavits on the part of the captors to contradict it, on a suggestion that further proof opened the case to both parties. Sir William Scott said:

> With respect to plea and proof this is true; but I do not know that in proof by affidavits this court or the lords of appeal have ever laid down such a rule. I understand the rule to be that further proof by affidavits to be exhibited on the part of the captor is only admissible under the special direction of the court. It is a proper control over the rash or light manner with which the claimants may attempt to pick up something like proof by affidavit; but it is not to be exercised except on special grounds and only with the leave of the court.

On the other hand, the case of *The Harmony* (2 Rob., 322) was argued on production of further affidavits at several times, but these affidavits were connected and circumstantial accounts of all the transactions bearing upon the question at issue, namely, the national character of one of the claimants, so that the court was able to examine and analyze (as we submit the court should be in a position to do in the case at bar) all the transactions and circumstances entering into a settlement of the question.

In *The Sally* (1 Gall., 401), Justice Story on circuit admitted the captors' affidavits as a showing in contradiction of testimony of the claimants upon plea and proof, which he found to be wholly unsatisfactory to prove the innocence of the claimants. He considers the English cases, which appear to hold that where captors are admitted to give evidence on further proof their affidavits are inadmissible, and on the whole finds that there

is not sufficient authority to preclude the court from receiving captors' affidavits in cases of further proof where any evidence on their part is admissible, especially where, as in the case before him, suspicion attached to the original transaction. The learned justice uses the following language regarding the proper source of affidavits:

> In all cases where it is practicable it is the duty of the owners to claim in person, or at least to annex their own affidavits to the special facts stated in support of the claim. There is great danger from a different course. It leads to the substitution of the oaths of mere uninformed agents, who can in general testify only to their belief, instead of the oaths of the parties who are conversant with the facts and have the most weighty responsibility attached to their conduct.

Judge Sprague in *The Amy Warwick* (2 Spr., 150) was of opinion that a detailed statement supported by affidavits was required of any party who asked leave to offer new and independent proof, but that the rule did not apply to a party who only sought to meet with counter-proof to the same points the evidence introduced by an opponent. The question having arisen whether proof should be by affidavits or in the form of depositions, with references to English and American cases as allowing affidavits in cases of what is technically called further proof as distinguished from plea and proof, the court determined that without deciding that affidavits were inadmissible in cases of further proof, he should order the proofs in that case, as more satisfactory, to be taken by a commission on interrogatories and cross-interrogatories.

B.—*Generally as to title by transfer of bills of lading and as to the security thereby pledged.*

On May 31, 1898, a specially authorized agent of the claimants deposed to the facts upon information and belief, and states that the merchandise was shipped by neutrals of the Argentine Republic to be transported to Havana, there to be delivered to shippers' order according to the tenor of the bills of lading; that upon and after the shipment the claimants, long prior to the capture, made their advances upon the security of the cargo, and that thereupon the bills of lading were delivered to them duly indorsed in blank, with the intent that they should take title, and should upon the arrival of the vessel at its destination take delivery and hold the same as security until the advances were paid. The claimants then obtained, on June 2, 1898, their order for further proof, which was successively extended to August 31 and to October 15.

When the three affidavits of the claimants' manager came in, the last one on November 7, 1898, they really showed no additional facts, the plainly intended inference from all the evidence offered being that the neutral shippers were also the owners, or at least possessed a *prima facie* title to the property. The allegation is made in Hareke's affidavit that the cargo was ultimately destined for Don Pedro Pages, of Havana, but there is nothing to indicate that the consignment to him on order might not have been for account of the neutral shippers. The course of events as to indorsement, delivery, acceptance, and pay-

ment of the bills of lading and the bills of exchange, respectively, so far as these appear, is as follows:

On March 14 or 15, 1898, the shipment was made and the voyage began, and the two bills were drawn upon the bankers, one to the order of a London bank having a branch house in the Argentine Republic, and the other to the order of the shippers; the first, for part of the beef and the garlic, being signed by the shippers, and the second, for the balance of the beef, by the master of the vessel. Both bills were accepted on April 6, and on May 9 were paid to the London bank in question. The capture occurred on May 17. The allegation is that the claimants are wholly unindemnified, except by the proceeds of the cargo and the insurance thereon, by which the insurers are subrogated to their own rights. The bills of lading for part of the beef and the garlic were, on April 9, sent by the claimants to their Havana agents, who were advised of the acceptance of the relative draft, and "would, in the ordinary course, hold the said documents until payment had been made by the consignee of the said goods." The bills of lading for the balance of the beef were retained by the bankers pending the disposal of the cargo. In June these agents, in reply to instructions to return the documents inclosed to them, cabled that they had not been received. In September, 1898, the original bills sent by the Havana agents turned up, but without any information as to how the bills came into their possession; and in October, 1898, copies or duplicates of these same bills were also received by the claimants from the agents without explanation. All the original bills of lading are

signed by the master; copies or duplicates are signed or attested by the shippers. The Spanish consul at Montevideo viséd the manifest, showing a shipment by Pla, Gibernau & Co., the Argentine neutrals, "as good for Havana, with a cargo of jerked beef and garlic 'to order,'" but not naming the consignee. But the invoices which came in with the bills show the real ownership and interest in the shipment. (Translation of documents, pp. 38–42.)

Thus it is seen that no facts as to the negotiations or correspondence which must have entered into the transaction are given, and no explanation whatever of these important features in the case. Indeed, the *suppressio veri* is striking throughout.

From *The Soglasie* (Spinks Prize Cases, 104) it is evident that the right demand and effort of the prize court is to be informed of all the facts, and especially of the correspondence and transactions preceding, accompanying, or following the essential fact or occurrence upon which the claim rests.

> But, on the other hand, when such means of information, which might naturally be expected, are wanting, and further proof has been allowed, the court is led to suppose that that which is almost indispensable to a just cause, either does not exist, or, if produced, would be detrimental to the cause of the producent (p. 107).

Here the questions are: Who are the real owners? Who were, as a matter of fact, interested in this cargo and shipment? The claim simply alleges a neutral right which the Government contends is a mere cover to an enemy interest.

The tributary questions are: Did the insurance contemplate a war risk? Why were the bills of lading for the larger portion of the beef retained by the claimants and not sent on to their Havana agents with the other bills, for the same reason and the same purpose? Were they as a matter of fact retained by them on instructions from the enemy owner, or were they possibly sent to him in Spain, and does roundabout correspondence between the latter, his Havana representative, and the claimants and their Havana representative explain the delay in the recovery and submission of the documents?

As remarked, the claim implied that Pedro Pages, of Havana, as consignee, was the agent of the shippers. Nothing is said of his interest for himself or in a representative capacity, and nothing is said of Señor Valenti, the owner of the enemy vessel resident in Barcelona, and, as we contend, the owner of the cargo or of the larger portion. The invoices on pages 40 and 41 show that the real ownership of all the merchandise, except part of the garlic, rested in "the expedition or voyage of the '*Carlos F. Roses*'" and in "Mr. Pedro Pages' of Havana." Could there be clearer evidence of enemy interest, or could stronger reason be imagined than thus appears on the face of the documents for the asserted neutral owners to prove beyond question their right and title? The effect of this evidence against them, like the solemnity of further proof on "plea and proof" (which should have been resorted to here), was surely an awakening thing and should have moved the claimants to establish their right fully, affirmatively, and beyond doubt. (*The Magnus*, 1 Rob., 31, 33.)

> I can not help thinking there is an appearance of something like industry or *astutia* used to withdraw from the court circumstances of which it ought to be apprised. * * * I think it is a case that obliges the court to look with some suspicion—I do not say to employ anything of *astutia* in opposition to the *astutia* employed against it (for *astutia* does not belong to a court of justice), but to exercise its vigilance; and I think I violate no duty in coming to the inquiry with a certain degree of jealousy, which the appearances of the case and the general conduct of the parties have contributed to raise. (*The Rosalie and Betty*, 2 Rob., 343, 346, 347.)

Nevertheless the court below was of opinion that satisfactory proof had been given; that the title and right of possession to the property was in a neutral at the time of capture, because the property was consigned to the order of the neutral shippers, and bills were drawn upon the claimants and were sent to the claimants' Havana agent for the purpose of collecting the amount of the advances on the cargo upon its arrival. The opinion does not notice that the bills for part of the cargo did not go to Havana, but were retained by the claimants, nor that claimants did not assert that the bills were forwarded for the purpose of making a collection. The statement of the affidavit is that the claimants' Havana agents were advised of the acceptance of only one of the drafts, and that "they would in the ordinary course hold the said documents until payment," etc. This transaction was out of the "ordinary course." The bills may have been sent and, we claim were, merely to facilitate delivery to the consignee, the agent of the enemy owner, or agent, possibly, of the local Spanish authorities. What light

has been given by the claimants as to the relations between them and Señor Valenti?—possibly long continuing relations, and based upon ample credit or the actual deposit of funds.

The decision below accepted as conclusive in its application to the facts here the principle of commercial law, that the possession of a properly indorsed bill of lading for a valuable consideration is not only evidence of a *jus in re*, but also of the right of property and possession until the holder's claims are satisfied. The court, however, notices that the bills of lading covering part of the beef and the garlic, and corresponding to one of the bills of exchange, were delivered to the claimants on April 6, but that the date on which the bills of lading for the balance of the beef passed into their possession is not shown; Judge Locke, nevertheless, being of opinion that since the latter bill passed at once into the hands of the neutral shippers and was by them transferred to the claimant, it made no difference, even if the transfer occurred while the property was *in transitu*, because it is only transfers of property *in transitu* made between enemies and neutrals that will not be recognized by prize courts.

We contend that the learned judge in this opinion ignored the underlying facts of the real ownership and interest which appear upon the face of the papers, or are deducible therefrom by necessary implication, and that he failed to recognize the important respects in which even a valid claim to property, based upon the transfer of a bill of lading and upon a banker's lien, is affected by the rules of prize law.

The general rules as to negotiability of bills of lading and the transfer of the title to the property covered thereby upon indorsement and delivery of the bill without delivery of the property and without formal assignment, follow in their development a transition similar to that by which the property in notes and bills of exchange became freely transferable by mere indorsement. (Abbott on Shipping, 5th Am. ed., † p. 529.) By mercantile law and usage a bill of lading stands as a substitute and symbolic representative of the goods described therein. (*Glyn* v. *East India Packet Co.*, L. R. 7 App., 591.)

But Mr. Justice Yates, in *Wright* v. *Campbell* (1 Black. Rep., 628), expresses a doubt "whether an assignment of a bill of lading made it negotiable in the same degree as a bill of exchange." Though bills of lading are spoken of as negotiable, this is only in a qualified and restricted sense, and they are more accurately said to be quasi negotiable instruments. Bills of lading are not negotiable in the full sense in which that term is applied to bills and notes. Nothing more is meant in applying the term to bills of lading than that the transfer of the bill passes to the transferee the transferrer's title to the goods described. But while a bill of lading is presumptive evidence of the ownership of the goods described therein, it may be explained or rebutted by other evidence showing where the real ownership lies.

Thus it is evident that the inquiry at the threshold is, What was the actual interest of the transferrer? Who was the real owner of the goods and entitled to dispose of them?

As to the banker's lien, the general rule is that where the consignor draws upon his consignee for the purchase money, and the draft with bill of lading attached is indorsed and transferred to some one who discounts the bill of exchange, a special property in the goods thereby passes to the transferee, subject to be devested by the acceptance and payment of the draft; and if the consignee refuses to accept the draft, the title of the transferee becomes absolute.

Now, as to the nature of the security assumed to be given by the transfer of the bills of lading. It is perhaps a lien rather than a pledge, because, originally at least, a pledge passed the actual property as a bailment, and thus gave possession as well as the *jus in re* and implied a power of sale. But a power of sale also generally resides in the modern form of the pledge of choses in action under the term "collateral security." Except under statutory enactments by which the bill of lading is regarded strictly as a symbol of the goods and is placed on the same footing as a bill of exchange, the pledgee of a bill of lading has no more title in the goods than he would obtain if the goods themselves were delivered; that is, he gets only the title that the assignor has. The title by pledge is subject to be devested by the payment of the debt secured, and the pledgee has liabilities and duties cast upon him in consequence of the pledge as well as rights. A pledgee to whom a bill of lading is given as security gets the legal title to the goods and the right of possession only if such is the intention of the parties.

In reference to these subjects, as in most other legal situations, there are certain presumptions and preposses-

sions, especially in favor of *bona fide* purchasers for value; but the real state of the case may be shown, and when shown is conclusive. A bill of lading, though *prima facie* evidence of property in the hands of a *bona fide* endorsee for valuable consideration, is capable of explanation to show the actual intent of the parties. These doctrines have been established in decisions from the early and leading case of *Lickbarrow* v. *Mason* (2 T. R., 73) to modern cases in the English courts like *Pease* v. *Gloahec* (L. R. 1 P. C., 219), and in the State courts, such as *Low* v. *De Wolf* (8 Pick., 101), *Rochester Bank* v. *Jones* (4 N. Y., 497), *Holmes* v. *German Security Bank* (87 Pa. St., 825), *Stollenwerck* v. *Thacher* (115 Mass., 224), and cases decided in this court—among others, *Conard* v. *Atlantic Insurance Co.* (1 Pet., 386), *Pollard* v. *Vinton* (105 U. S., 7), *Mo. Pac. R. R.* v. *McFadden* (154 U. S., 155). The latter cases considered the bill of lading in its aspect as a contract to transport rather than as a receipt for the goods, but approved the view that the "transfer does not preclude, as in cases of bills or notes, all inquiry into the transaction in which it originated, because it has come into the hands of persons who have innocently paid value for it. The doctrine of *bona fide* purchasers only applies to it in a limited sense." (*Pollard* v. *Vinton*, *supra*.) "Indeed, the indorsement of a bill of lading was not considered to be properly an actual transfer in itself of the goods mentioned, but rather evidence, or an act raising a presumption of such a transfer; and consequently the object and legal effect of the indorsement might be ascertained by other circumstances."

(Abbott on Shipping, † p. 537; A. & E. Encyl. Law, vol. 18, p. 637.)

The bills here were drawn, the one to the order of the London and River Plate Bank by the shippers, and the other to the order of the shippers by the master, upon the bankers direct and not upon the consignee for discount by the bankers. It is to be noted that the tenor of the first bill contained an order to charge to the account of Pages as per advice, and of the second, to the account of Valenti as per advice, showing, we claim, the real interests and the necessity of full and satisfactory proof of the relations and occurrences which led to this transaction; and also showing that the different form and fate of these bills with their respective documents indicate some distinctive and separate incidents which ought to have been made plain, although they both show the enemy ownership.

The invoices sufficiently show Pages to be the consignee on his own account or Valenti's, and to a very limited extent on the shippers' account; from which it is evident that the consignor was a mere agent for purchase (*Potter* v. *Lansing*, 1 Johns., 215), and this is confirmed by the charge of a commission in the invoice; which brings us back to Pages and Valenti as the real owners or consignors.

The property, therefore, remained in the consignors who were personally liable to the bankers for the advances, but as to the goods, the attaching prize rights were paramount and overrode the lien or pledge. (*The Venus*, 8 Cr., 253, 275; *The Merrimack*, id., 317, 327, 328; *The Frances*, 8 Cr., 359; *The Frances*, 9 Cr., 183

The Mary and Susan, 1 Wheat., 25; *The St. José Indiano*, id., 208.) The real owners were, in effect, both consignors and consignees, and the result of this is that the neutral shippers and indorsers of the bill of lading had no real interest to transfer, and that their enemy principal's interest devolved upon the bankers subject to the risk of capture *jure belli*.

Now, it is true that mere shipment of goods does not always vest the property in the consignee though he be a purchaser. Bills for delivery to the shipper or order convey notice that although goods be shipped on account and risk of a consignee, and delivery to him be the object and intention of the shipment, there may yet be some unfulfilled condition on which the right to possession depends, inducing the shipper to retain the ultimate appointment of the consignment. But will it be doubted in this case that the agent in Havana of the real owner and shipper would have been duly appointed and received delivery if the shipment had arrived; or that the bankers, not showing beyond their own affirmation their actual and continuing interest and control, would have interposed a prohibition? If so, why did they retain the bill of lading for so large a portion of the cargo? Whether or not Pages had an independent interest in a part of the shipment, and was not merely the representative of Valenti—may not Valenti have received this retained bill of lading for the purpose of full instructions to his Havana correspondent concerning delivery of the merchandise? Was the bill "retained" by the claimants only in the sense that it was not forwarded to their

Havana agent, and not in the sense that it was not transmitted to Valenti at Barcelona for his complete disposal as owner? *Non constat* that if the goods had arrived at Havana the contract of purchase and delivery and the engagement with the bankers would not have been duly settled according to the true tenor of the transaction, apart from the proceeds of the goods, or that Pages would not have received immediate delivery as the intended consignee for all interests. The bankers' instructions to their Havana correspondents have not been disclosed. Therefore the assertion of the banker's lien is no answer to the captors in a court of prize; let the bankers look to their debtors.

Sometimes a bill is indorsed for the collection of the relative draft from the consignee, and sometimes for the acceptance of it only, and the authorities are conflicting on the point whether in case a draft is accepted by the consignee, and there is no further specific instruction from the consignor, the pledgee may surrender the bill to the consignee. (See Am. and Eng. Encyc. Law, vol. 18, p. 636, and cases cited.)

Here that situation does not exist, because the draft was upon the bankers, and was paid by them, and to fortify the claim that the goods were not actually to be delivered to the consignee until payment had been secured, the real state of the accounts between the bankers and the other parties should have been shown, since the circumstances necessarily imply dealings between them. There was no counter draft by the bankers upon the consignee, and the correspondence with their Havana agents, giving instructions as to collection, is not furnished but

is only indicated generally, and the statements are very far from asserting that the instruction was either to collect or to obtain security from the consignee.

After default on the obligation, which is not shown in the case at bar, the remedies of a pledgee are by suit on the debt and recourse to the securities pledged. (See Id., p. 678 *et seq.*, and cas. cit.) The debtor can not compel the creditor to resort to the collateral before suit. In this case, where new and sovereign rights had attached, it is claimed that the positive obligation rested on the creditor of bringing suit, and of pursuing the collateral only in case the suit failed.

Now, there is one duty resting upon a creditor ordinarily, and that is to demand payment of the maker of the obligation held, and on his refusal, to give due notice of the demand and refusal to the other parties liable on the face of the obligation, or known to the creditor to be liable in fact, where the circumstances are special. If the draft had been on the consignee and he had discounted it with the bankers, regular protest would, of course, need to be shown. The difference in this transaction suggests again, with increased emphasis, the query why the bankers were drawees unless the real parties had an independent credit with them or some contract which ought to have been disclosed. There is no evidence in the case that Valenti, who on the best showing of the claimant had *some* interest in the cargo, was ever notified that the bankers looked to him for payment. We repeat our contention that the case should bring forward proof that the bankers made some effort to notify

and hold those people whose bills upon themselves they had authorized and paid, or the principals in the background; just as much as, in the case of bills discounted on the acceptances of consignees, they would be required to show due demand, protest, and notice of default. The pledgee must use due diligence to enforce payment, and we maintain in the case at bar the diligence should have been shown by suit or some equivalent proceeding against those personally liable. Wanting that, and as against the claim in prize, the assertion of neutral title by indorsement of the bill of lading must fail of success. Though entitled to but one satisfaction of his debt, a creditor may get judgment and issue execution on the debt as well as enforce a negotiable security. Here, while he has received the amount of the insurers' underwritings and may be pursuing his other remedies in the foreign jurisdictions, he is asserting the remedy by lien which prize rights especially override and extinguish.

Hence, allowing full just effect to the rules respecting transfer of title by indorsement of bills of lading and respecting pledges, the inquiry reaches down to the real facts of the case, and they have not been satisfactorily shown. There is nothing but the formal statement that the bankers have not been indemnified. They say they have collected insurance; they do not state how much, nor whether upon a contract constituting a war risk. If the insurers are really interested, why do not they make their claim or support the claimant's demand? The first liability is that of Valenti and Pages, and the goods are properly answerable (if at all) when it is shown that they can not respond, or that the claimants can not

hold them upon legal proceedings. Certainly against the proper vested rights of captors some testimony upon these points should have been adduced.

If to the foregoing suggestions the reply is made that the argument for the Government rests upon hypothetical facts and upon authorities in which circumstances showing a defective claim or weighing against the *bona fides* of the purchaser were not assumed but established, the answer is that in prize law the *onus probandi*, especially of a neutral interest, rests upon the claimant, and that a bare attestation by an agent of the most formal and meager facts, omitting all the antecedent and consequent transactions of the parties, amounts to that *astutia* to conceal or obscure the truth which merited and received Lord Stowell's condemnation in the case of the *Rosalie and Betty*, *supra*.

C.—*The neutral claim of title made here as affected by prize law.*

But we maintain that even if the title to the goods in the neutral bankers was more satisfactorily shown by the testimony and fully approved by the doctrines of commercial law, they can not be allowed here, because the well-established rule of prize court decisions is that a lien of this nature must yield to the sovereign claim of the belligerent and the vested rights of captors. It is true that decisions of the courts, under special circumstances, support the view that in such a case the captor takes *cum onere*, but this seems to be where the neutral is in possession of the actual goods with a right of retention until a certain amount is paid to him, and not where he has a

mere *jus in re* which he can not enforce without the aid of a court of justice, and the view is expressed that in order to make a fair uniform rule, it ought not to be that which stops at the mere legal title, but that which ascertains and deals with the real beneficial interest; and it is pointed out that otherwise when such title is held by an enemy in trust for the neutral, the latter would lose his property, but when it is in a neutral in trust for an enemy, the property would be restored, not for the neutral's benefit, but merely as a conduit through which to convey it to the enemy. (*The Amy Warwick*, 2 Spr., 150.) This decision cites *The Frances* (8 Cr., 418), *The Tobago* (5 Rob., 218), and *The Marianna* (6 Rob., 24), in which the neutral claims of this nature were not favored; and also certain English authorities appearing to hold the contrary, but they were cases in which British prize courts allowed to British merchants the amounts of their claims upon enemies' ship for repairs and supplies.

The Lynchburg (Blatchf. Pr. Cas., 49), decided that in prize law a bill of lading transmitted to a party to cover his advances on cargoes shipped does not pass the title to the cargo. The claimants in that case were loyal citizens who had made an advance to neutral merchants for the purchase of certain coffee, and who drew drafts on the express condition that the claimants should hold the coffee until their advances were reimbursed; and so far the court ordered restitution. But as to the balance of the claim, resting upon shipment under a bill of lading indorsed to the claimants, the court said:

> The claim to an absolute ownership * * * was placed before the court * * * upon the

> proposition of law that a bill of lading, transmitted * * * by the shipper to cover advances, passed * * * the title to the cargo purchased therewith. *If this doctrine be correct as to mere commercial transactions, it does not prevail in prize courts, in derogation of the rights of captors, when the interest of the claimants is only a debt*, although supported by liens equitable and tacit, or legal and positive, even of the character of bottomry bonds, when not signified on the ship's papers at the time of her capture. [Citing *The Frances, The Tobago, The Marianna, supra.*] *Here the vessel* [*was an*] *enemy's bottom; the bill of lading consigned the cargo to order or assigns, at large, at an enemy's port*, and, on the surrender of the principal portion of the consignment to the claimants, *no other evidence was given in establishing the facts that the remainder of the shipment was owned by them, or yet stood under hypothecation to them on the bill of lading.*

In that case, although the claimants were loyal citizens, the doctrine was applied and the fact fully recognized that such a claim must be established by other evidence than a mere statement of ownership or of hypothecation.

The case of *The Frances* (8 Cr., 418) and the English cases are sufficiently discussed in the main brief for the Government and the captors.

In the cases discussed by Mr. Justice Story in his Notes on the Principles and Practice of Prize Courts, at pages 66 and 67, the questions involved refer to the devestment of title *in transitu* or to invoice evidence that the shipment was for the account of the claimants and that the goods were purchased in pursuance of the orders of the claimants, and do not refer to such an aspect of the transfer of title by indorsement and delivery of bills of lading

as is presented in the case at bar. The learned justice, on page 68, referring to the cases of the *St. Jose Indiano* (2 Gall., 268; 1 Wheat., 208) and *The Mary and Susan* (1 Wheat., 25)—see main brief for Government and captors for exhaustive reference to the latter case—says that when an agent abroad makes purchases of goods in pursuance of orders for a principal, ordinarily he devests himself of title, although he may sell his own goods or purchase the goods on his own credit, and the proprietary interest vests in the principal immediately on such purchase if the agent parts with possession by an actual and unconditional delivery for the use of his principal. "Such delivery or appropriation * * * need not be by a direct act, but it may constructively arise from the circumstances of the case *even where the shipper has made an immediate assignment of the goods.* In all these cases the material question is, whether the shipper retains or possesses any control over the property (independent of the mere right of stoppage *in transitu* in cases of insolvency), or has parted with possession and all authority over it."

We contend, in the light of these principles, and since there is no convincing proof of a neutral title here, that notwithstanding the immediate assignment by the shipper upon his indorsement of the bill of lading, he had fully parted with possession and authority in behalf of the enemy shippers and consignee, whose interest clearly appeared from the invoices.

The broadest neutral right which can be maintained is where more than a *prima facie* title is shown, where the neutral interest is proved by complete and convincing

evidence to be a reality and to be *bona fide*, and in such a case it may be that in the balance of rights between a neutral claimant and captors, the captors' claim would be required to yield. Otherwise the belligerent rights outweigh and override the neutral claim, which is then presumed to be serving as a mere cover to an enemy interest, and is regarded merely as a debt, the collection of which must be sought by the claimant through ordinary legal proceedings in the appropriate jurisdiction against his principal and debtor.

There is another indication in this record besides those heretofore pointed out of the real ownership in connection with the vessel's entire voyage. There was no charter party, which is a very usual and proper document for a vessel to carry, especially on a long voyage. The last voyage began at Barcelona, where the enemy vessel owner, Valenti, resided. (Rec., p. 8.) It sailed some time prior to March, 1898, for Montevideo, with a cargo of wine and salt, took on the jerked beef and garlic at Montevideo, and then was proceeding for Havana when captured. It is most likely that the vessel did not have a charter party for two reasons: In the first place, a charter party is a very revealing document as to the transactions which the vessel is pursuing; in the second place, a vessel would be much less likely to carry a charter party when the commercial venture is her owner's; and therefore we claim that it quite clearly appears from the record that the entire voyage was on Valenti's account, and substantially the whole interest in both cargoes belonged to him. At least, as we have above pointed out, the invoices show his interest in the

cargo before the court, both separately and in connection with Pages, the consignee at Havana, who was quite clearly a correspondent and the Cuban agent of the mercantile adventure formed in conjunction with the London bankers, or on credits arranged with them, to carry a profitable food cargo for the Spanish Government market at Havana.

D.—*Provisions as contraband when destined for a besieged stronghold of the enemy.*

Provisions have been contraband of war at various periods, and are so regarded by the consensus of more recent authorities when destined for military use. The question whether they are generally contraband is by no means settled. It depends on the attitude of the belligerent himself, as shown by his proclamations, on the view which is adopted in the particular country, and on various circumstances in the situation of the parties to the war. Late events show that even now a leading power of the world is by no means ready to admit or concede that provisions are not contraband generally.

In *The Commercen* (1 Wheat., 382) the cargo was barley and oats, the property of British subjects. Justice Story said that by the modern law of nations provisions are not generally deemed contraband, but may become so, although belonging to a neutral, on account of the particular situation of the war or on account of their destination, as, if destined for military use, for the army or navy of the enemy, or his ports of naval or military equipment.

In *The Peterhoff* (5 Wall., 28) the goods consisted of cases of harness, army boots, blankets, and similar articles, also an assortment of drugs; and the rule was laid down by Chief Justice Chase that besides the class of articles ordinarily intended for military purposes there was a class of articles which may be and are used for purposes of war or peace, according to circumstances; that merchandise of this class is contraband only when actually destined for the military or the naval use of the belligerent, whether the port for which it clears is blockaded or not, while merchandise consisting of articles exclusively used for peaceful purposes is not contraband at all, although liable to seizure and condemnation for violation of blockade or siege.

In the case of *Maisonnaire* v. *Keating* (2 Gall., 325) a cargo of provisions was held contraband, the language of the court being:

> Admitting that provisions are not in general contraband of war, it is clear that they become so when destined to a port of naval equipment of an enemy, and *a fortiori* when destined for the supply of his army.

See also Parsons' Marit. Law, vol. 2, pp. 93, 94; 1 Kent, 140, where the learned chancellor says that goods not generally contraband may become so "under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it," the important distinction being whether the articles are intended for ordinary use or going with a highly probable destination to military use; *The Peterhoff* (Blatchf. Pr. Cas., 463), quoting from Moseley on Contraband of War, and citing

the works of Halleck and Phillimore on International Law.

These authorities are in accord with decisions of Sir William Scott.

The Jonge Margaretha (1 Rob., 189) was a case of a cargo of cheese condemned as contraband on the ground that it was destined for a port of naval equipment. The learned judge expresses the view that if the great predominant character of a port be that of a port of naval military equipment, the articles ought properly to be condemned, although merchant ships resort to the same place and although it is possible that the articles might have been applied to civil consumption.

In *The Edward* (4 Rob., 68) wines going from Bordeaux to Brest were condemned, the port of destination containing a large armament much in need of such provision, the character of the vessel being held to be that of a French victualer carrying *munitions de bouche*.

The *Frau Margaretha* (6 Rob., 92) was distinguished from the *Jonge Margaretha*, the cargo of the former also consisting of cheese, because the destination was not to Brest, the naval arsenal of the enemy, but to Quimper, a point near, but not to be regarded as an identical destination. The decision was that the articles were not so clearly contraband, "though certainly very near it," as to preclude claimant from giving further proof.

(See also the *Zelden Rust*, 6 Rob., 93, and *The Ranger*, id., 125.)

Now, Havana was the seat from time immemorial of Spanish sovereignty in Cuba; it was the headquarters

of the civil, military, and naval service of the island; it contained, especially in anticipation of a war which all the world and particularly all Americans and Spaniards regarded as inevitable from early in the year 1898, the garrisons, camps, hospitals, arsenals, shipyards, and the civil establishments tributary to the Spanish Government, with an increasing concentration of troops from the peninsula, and of the volunteers (the native branch of the Spanish service, similar to militia) from the surrounding country. The concentration and accumulation of provisions at Havana, then, was a necessary part of the Spanish military operations, and Spaniards in the commercial service of their country were fully apprised of that fact. It was known that such food accumulation was especially necessary, because Havana was sure to be the chief point of blockade and siege, as it was as soon as war resulted. Further, the provisions in this case, jerked beef and garlic, were especially appropriate to military use as important components of Spanish army rations. Consequently the military destination of the cargo shipped in a Spanish vessel owned and manned by Spaniards, and the enemy ownership, which not only was not disproved, but evidently appeared, make the goods valid prize under the "particular situation of the war" or "the condition of the parties engaged in it," or "on account of their destination" (*The Commerce*n, *supra;* 1 Kent, 140), irrespective of the neutral claim and irrespective of the fact that the voyage began some time before war was actually declared and before Havana was placed under a state of blockade. If these features have any bearing upon the

case under the circumstances, it must fairly be presumed that the enemy shipper sent forward the cargo with full anticipation of the actual hostilities which followed.

A neutral claim must come before a belligerent prize court, enforcing the belligerent's just rights, with such clear and full proof that the jealousy and suspicion, with which Lord Stowell thinks prize tribunals must look upon neutral claimants connected with the enemy's trade, necessarily disappear. This neutral claim being a mere cover finds nothing in the sailing before the actual declaration of war to sustain it. The property was enemy property found upon the high seas during the hostilities, and the enemy owner must necessarily suffer this loss as well as the loss of his vessel.

We therefore respectfully submit to the court that on this record and the legal doctrines applicable to it there was no valid transfer of title in this enemy property to the claimants. They may well enough be left to seek the payment of the debt due them from those who owe it as a personal obligation; the insurers, if neutrals (and the neutrality of the insurers is not even alleged), may justly be assumed to have taken a war risk and to have received the large premiums paid for such a risk; and the merchandise, being food supplies of a peculiarly valuable nature to the Spanish forces, destined for the seat of their government in Cuba, where food stores for the Government officers and forces, civil and military, would need to be accumulated—all of which was perfectly patent long before the war and beyond doubt to a Spanish vessel

owner and trader—was clearly contraband of war; and therefore a decree of condemnation should have been entered below. If the small portion of the merchandise shown by the invoice on page 41 ever belonged to the Argentine shippers, Pla, Gibernau & Co., or still belongs to them, they have made no claim, and more than a year and a day have elapsed since the institution of the prize proceedings, and therefore this portion of the property should be deemed to be abandoned and be condemned to the captors for contumacy and default of the supposed owner. (*The Harrison*, 1 Wheat., 298.)

We therefore respectfully ask that the decree below be reversed and a decree be entered condemning the property to the United States.

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No. 243.

Brief of H. M. Hoyt for Appellant

Supreme Court of the United States.

October Term, 1899.

Filed Jan. 9, 1900.

THE UNITED STATES,
APPELLANT,
vs.
KLEINWORT SONS AND COMPANY, CLAIMANTS OF THE CARGO OF THE SPANISH BARK "CARLOS F. ROSES."

No. 243.

Appeal from the District Court of the United States for the Southern District of Florida.

BRIEF FOR THE APPELLANT.

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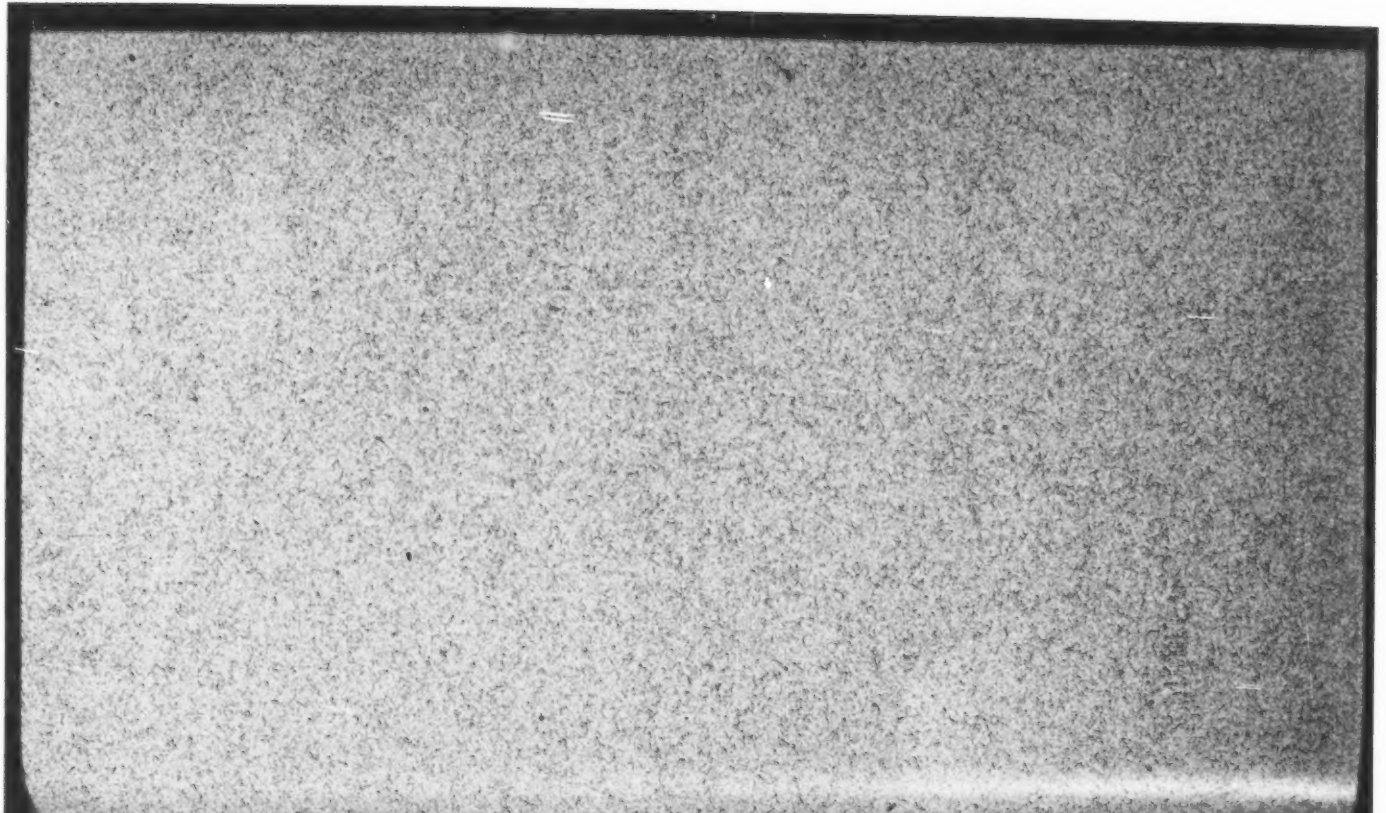

Supreme Court of the United States.

OCTOBER TERM, 1899.

THE UNITED STATES,
APPELLANT,
v.
KLEINWORT SONS AND COMPANY,
CLAIMANTS OF THE SPANISH BARK "*Carlos F. Roses.*"

No. 243.

BRIEF FOR THE APPELLANT.

STATEMENT OF FACTS.

This is an appeal from a decree of the District Court of the United States for the Southern District of Florida, by which it was ordered that the proceeds of the sale of the cargo of the Spanish bark *Carlos F. Roses* be paid to the claimants (pp. 13–14).

The vessel sailed under the Spanish flag and was owned, officered and manned by Spaniards. Her last voyage began at Barcelona, Spain, whence she proceeded to Montevideo, Uruguay, with a cargo of wine. All of the outward cargo was discharged at Montevideo, where the vessel took on a cargo consisting of jerked beef and garlic, to be delivered at Havana, Cuba, and sailed for the latter

port on March 16, 1898. On May 17th, when in the Bahama Channel, near Matternillos, Cuba, and pursuing her course for Havana, she was captured by the U. S. F. S. *New York* and sent to Key West in charge of a prize crew (pp. 7–9).

The bark and her cargo were duly libeled on May 20th (p. 1). All of the ship's papers were delivered to the prize commissioners (p. 2) and the deposition of Maristany, her master, was taken *in preparatorio* (pp. 7–9). Kleinwort Sons & Company, of London, a banking and brokerage firm, composed of British subjects, made claim to the cargo, alleging that they were its owners, and hence that it was neutral property and not lawful prize of war (p. 10). In support of the claim, the firm's agent in the United States presented a test affidavit, made on information and belief. In this it was alleged: That the members of the firm were subjects of the United Kingdom of Great Britain and Ireland; that in February and March, 1898, the Spanish bark *Carlos F. Roses*, being in Montevideo bound on a voyage to Havana, took on board a cargo of jerked beef and garlic, which was shipped by Pla Gibernau & Company, commission merchants of Montevideo, to be transported to Havana and there delivered to the order of the shippers, according to the conditions of certain bills of lading issued therefor by the master of the bark to Gibernau & Company; that the members of the firm of Gibernau & Company were citizens of the Argentine Republic; that the bark sailed from Montevideo on March 16th and proceeded upon her voyage toward Havana until May 17th, when, being at a point in the Bahama Channel off Martinique, she was captured by the U. S. F. S. *New York*, without resistance on her part, and sent into Key West as prize of war; that upon and after the shipment of the cargo in Montevideo and prior to the capture of the

bark and her cargo, the claimants made advances to the shippers and owners of the cargo to the amount of $30,644.35, upon the security of the cargo, and at the time of making such advances and in consideration thereof, the bills of lading were delivered to the claimants, endorsed in blank, for the purpose of conveying to the claimant the title to the bills and the cargo, and in order that, upon the arrival of the vessel at Havana, the claimants should receive the shipments and hold them as security for their advances until paid, with full right to possess and dispose of them, and apply the proceeds on account of their advances, the repayment of which had never been made or secured to them; and that, by reason of these things, the claimants became and at the time of capture were the owners of the cargo (pp. 10–11).

The cause was heard upon the libel and claims of the master of the bark and Kleinwort Sons & Company, and the evidence taken *in preparatio*. The vessel was condemned as enemy property. Further proofs were ordered with regard to the ownership of the cargo. Because of its perishable nature, the marshal of the court was ordered to advertise for sale and sell the cargo and deposit the proceeds in accordance with law. No appeal was taken on behalf of the vessel. The cargo was sold and the proceeds deposited with the Assistant Treasurer of the United States at New York, subject to the order of the court (p. 12).

From time to time, the court showed great liberality toward the claimants in extending their time for taking further proofs. No witnesses were produced by the claimants or the United States, but Charles F. Harcke, the claimants' manager in London, made three *ex parte* affidavits before the United States consul general, which were offered as evidence by the claimants. Appended to the affidavits

were a large number of exhibits purporting to be papers, or copies of papers, relating to the shipment of the cargo, and financial transactions of some of those who had to do with it (pp. 17–37; See translations, pp. 38–42). Harcke did not see any of these papers signed and delivered, nor did he see them until the expiration of more than three weeks after the dates which they bore. From the affidavits and papers it appears that the voyage of the *Carlos F. Roses* was a joint venture entered into by Pedro Pagés, of Havana, a Spanish subject; the Spanish owners of the vessel, and Gibernau & Company, commission merchants of Montevideo (pp. 40–41). The whole cargo was made up of two shipments, one of jerked beef and one of garlic, which had been purchased by Gibernau & Company, on commission, and by them delivered to the *Carlos F. Roses* "*consigned to order for account and risk and by order of the parties noted*," in the invoices. The shipment of jerked beef, containing 275,640 kilograms, in bulk, was divided thus: 60 per cent., or 165,384 kilograms, *for the account of the expedition or voyage of the Carlos F. Roses;* 40 per cent., or 110,256 kilograms, *for the account of Pedro Pagés of Havana.* The shipment of garlic, containing 19,980 strings, in bulk, was divided thus: 50 per cent., or 9,990 strings, *for the account of Pedro Pagés*, and 50 per cent., or 9,990 strings, *for the account of Gibernau & Company.* Both invoices were signed by Gibernau & Company and bore date March 11th and 12th, 1898 (pp. 40–41, Exs. Z and AA). It is admitted by the claimant that all of "*the said cargo was ultimately destined for Don Pedro Pagés of Havana*" (p. 18). The ship's manifest appears to have been signed by Maristany, her master, at Montevideo, on March 15, 1898, but, strange to say, was viséd by the Spanish consul at that port, on the previous day. It described the ship's destination as

Havana and her cargo as made up of two lots of jerked beef, containing 248,076 kilograms, and 29,970 kilograms, respectively, and one lot of garlic, containing 19,980 strings, all shipped by Gibernau & Company, and consigned "to order" (p. 42). On March 14th, Maristany issued three bills of lading in which it was stated that the shipments were received from Gibernau & Company for transportation to Havana "for account and at the risk of whom it may concern." One bill of lading covered a shipment of 165,384 kilograms of jerked beef; one, 110,256 kilograms of jerked beef; the third, 19,980 bunches of garlic (pp. 38–40). On March 15th, Gibernau & Company drew this bill of exchange (p. 38, Ex. A):

> "No. 129. Montevideo, March 15, 1898. For £2,714 13 8. Ninety days after sight you will please pay for this first of exchange (the second and third being unpaid), to the order of the London River Plate Bank, L'd, the sum of £2,714 13 8, value received, *which you will charge to the account of Pedro Pagés, of Havana as per advice.*
>
> "PLA GIBERNAU & Co.
>
> "To Messrs. Kleinwort Sons & Co., London."

On the same day, Maristany drew this bill of exchange (p. 38, Ex. B):

> "No. 129. Montevideo, March 15, 1898. For £3,583 11 6. Ninety days after sight you will please pay for this first of exchange (the second and third being unpaid), to the order of Pla Gibernau & Co. the sum of £3,583 11 6, invoice value of jerked beef, per Carlos F. Roses, *which you will charge to the account of P. Roses Valenti, of Barcelona, as per advice.*
>
> "YSIDRO BERTRAN MARISTANY.
>
> "To Messrs. Kleinwort Sons & Co., London."

and condemned the cargo as enemy property. Dr. Lushington referred to *The San Jose Indiano and Cargo*, 2 Gallison, 267, and subscribed to what was there said by Mr. Justice Story, but thought his remarks inapplicable to the case in hand.

The case referred to was affirmed by this court. 1 Wheat. 208. Goods were shipped by Dyson, Brothers and Company of Liverpool on board a neutral ship bound to Rio de Janeiro, which was captured and brought into the United States for adjudication. The invoice was headed: "Consigned to Messrs. Dyson, Brothers, and Finnie, by order and for account of J. Lizaur." In a letter accompanying the bill of lading and invoice, Dyson, Brothers and Company wrote Dyson, Brothers, and Finnie: "For Mr. Lizaur we open an account in our books here, and debit him, etc. We cannot yet ascertain the proceeds of his hides, etc., but find his order for goods will far exceed the amount of these shipments, therefore we consign the whole to you, that you may come to a proper understanding with him." The two houses consisted of the same persons. It was held that the goods were, during their transit, the property and at the risk of the enemy shippers, and therefore subject to condemnation. Lizaur's claim was rejected although Dyson, Brothers and Company had the proceeds of his hides in their hands.

The Lynchburg, Blatchford's Prize Cases, 57, and *The Amy Warwick*, 2 Sprague, 150, are cited on behalf of claimants, but, as we read them, they do not sustain their contention. The schooner Lynchburg with a cargo of coffee had been libelled during the civil war as enemy property, and also for an attempt to violate blockade. Brown Brothers and Company, loyal citizens, intervened as claimants of 2045 bags of coffee, part of the cargo. They alleged that they had made an advance of credit to Maxwell, Wright and Company, neutral merchants of Rio de Janeiro, for the purchase of the coffee, under which credit Maxwell, Wright and Company drew drafts on Brown Brothers and Company for £6000, on the condition expressed therein that the coffee purchased by claimants should be held until their advances were reimbursed thereon. It was admitted by the United States attorney that 1541 bags of the coffee

should be released to Brown Brothers and Company, and that was done. As to the remaining 504 bags embraced in the general claim of Brown Brothers and Company, in which Wortham and Company of Virginia, asserted an interest, it was held by the court that as no proof was given by claimants that the value of the 1541 bags restored to them was not equivalent to the sum of their advances used in purchasing the whole 2045 bags, the reasonable presumption was that the restoration satisfied the entire advance. And Judge Betts said: "The claim to an absolute ownership of the 2045 bags was placed before the court in the oral argument, and in the written points filed in the cause by the counsel for the claimants, upon the proposition of law, that a bill of lading, transmitted to them by the shipper to cover advances, passed to them the title to the cargo purchased therewith. If this doctrine be correct as to mere commercial transactions, it does not prevail in prize courts, in derogation of the rights of captors, when the interest of the claimants is only a debt, although supported by liens equitable and tacit, or legal and positive, even of the character of bottomry bonds, when not signified on the ship's papers at the time of her capture. *The Frances*, 8 Cranch, 418; *The Tobago*, 5 C. Rob. 218; *The Marianna*, 6 C. Rob. 24. Here, the vessel was an enemy bottom; the bill of lading consigned the cargo to order or assigns, at large, at an enemy's port, and, on the surrender of the principal portion of the consignment to the claimants, no other evidence was given in establishing the facts that the remainder of the shipment was owned by them, or yet stood under hypothecation to them on the bill of lading." The 504 bags were condemned, "because, by intendment of law, that portion belonged to Wortham and Company, and was not shown by the proofs to be exempt from capture as prize."

In *The Amy Warwick*, J. L. Phipps and Company of New York, British subjects, purchased 4700 bags of coffee, part of the cargo of an enemy vessel, which they had purchased through Phipps Brothers and Co., their firm at Rio, with funds of an enemy firm, and £2000 of their own money by draft on Phipps and Co., their firm at Liverpool. They took from the master

a bill of lading which stated that Phipps Brothers and Company were the shippers of this coffee, and that it was to be delivered to their order. Indorsed on the bill of lading was a statement declaring that a portion of the coffee was the property of British subjects. Phipps Brothers and Company indorsed the bill of lading over to J. L. Phipps and Co. They also delivered to the master another part of the bill of lading, an invoice of the coffee, and a letter of advice to be conveyed to the firm in New York. This letter stated that the coffee was shipped for account of merchants at Richmond, Virginia, and that a bill of lading would have been sent to them had it not been deemed advisable by reason of the unsettled state of political affairs, for the better protection of the property, and to prevent privateers from molesting the vessel, to have it certified on the bill of lading that a portion of the coffee was British property, and that this referred to the portion against which they had valued on Liverpool. It was held that the facts led plainly to the conclusion that claimants ought to be repaid the amount they had expended from their own funds in the purchase of the coffee and that the residue of the proceeds should be condemned. It was said that as the coffee was purchased at Rio by the claimants, and shipped by them on board the vessel under a bill of lading by which the master was bound to deliver it to their order, and they ordered it to be delivered to J. L. Phipps and Co., that is, to themselves, they were the legal owners of the property, and could hardly be said to have a lien upon it. Their real character was that of trustees holding the legal title and possession with a right of retention until their advances should be paid. The doctrine of liens was considered, and *The Frances*, *The Tobago*, *The Marianna* and other cases examined. Judge Sprague was of opinion that the rule in such cases ought not to be that which stops at the mere legal title, but that which ascertains and deals with the real beneficial interest, "for, if the court were never to look beyond the legal title, the result would be that when such title is held by an enemy in trust for a neutral, the latter loses his whole property; but, when the legal title is in a neutral in trust for an enemy, the property is restored to the neutral, not for his benefit, but

merely as a conduit through which it is to be conveyed to the enemy. To refuse to look beyond the legal title is to close our eyes for the benefit of the enemy. It would enable him always to protect his property by simply putting it in the name of a neutral trustee."

We agree with counsel for the United States that notwithstanding the indorsement of Gibernau and Company on the bills of lading, the proof of a neutral title was not sufficient. Even if when the neutral interest is adequately proven to be *bona fide*, the claim of the captors may be required to yield, yet in this case the belligerent right overrides the neutral claim, which must be regarded merely as a debt, and the assignment as a cover to an enemy interest.

Something was said in argument in relation to the character of the cargo. It is true that by the modern law of nations, provisions, while not generally deemed contraband, may become so, although belonging to a neutral, on account of the particular situation of the war, or on account of their destination, as, if destined for military use, for the army or navy of the enemy, or ports of naval or military equipment. *The Benito Estenger*, 176 U. S. 568; *The Panama*, 176 U. S. 535; *The Peterhoff*, 5 Wall. 28; Grotius De Jure Belli et Pacis, lib. III, c. 1, § 5; Hall, § 236.

Doubtless, in this instance, the concentration and accumulation of provisions at Havana might fairly be considered a necessary part of Spanish military operations, *imminente bello*, and these particular provisions were perhaps especially appropriate for Spanish military use; but while these features may well enough be adverted to in connection with all the other facts and circumstances, we do not place our decision upon them.

We are of opinion that a valid transfer of title to this enemy property to claimants was not satisfactorily made out, and that

The decree below must be reversed, and a decree of condemnation directed to be entered, and it is so ordered.

MR. JUSTICE SHIRAS and MR. JUSTICE BREWER, dissenting.

MR. JUSTICE SHIRAS, with whom concurred MR. JUSTICE BREWER, dissenting.

This is an appeal from a decree of the District Court of the United States for the Southern District of Florida, awarding to Kleinwort Sons & Company, the claimants, the proceeds of the sale of the cargo of the Spanish bark Carlos F. Roses.

The vessel sailed under the Spanish flag, and was owned, officered and manned by Spaniards. On or about March 14, 1898, Pla Gibernau & Company, a firm of commission merchants doing business at Montevideo, in the Republic of Uruguay, shipped on board the bark, then lying at Montevideo, a cargo consisting of about 275,000 kilos of jerked beef and 20,000 strings of garlic. The property was consigned upon three bills of lading to the order of the shippers; and two bills of exchange, at ninety days, were drawn upon the claimants, Kleinwort Sons and Company, British subjects, domiciled and doing business as bankers at London, England. One of these bills, for £2714 3 8, was drawn by Pla Gibernau & Company to the order of the London and River Plate Bank, Limited, a banking concern doing business in Montevideo; the other, for £3583 11 6, was drawn by the master of the Carlos F. Roses to the order of Pla Gibernau & Company, and was by them indorsed to the order of the London and River Plate Bank, Limited.

The bills of exchange and the bills of lading came that day, March 15, 1898, into the possession of the London and River Plate Bank, which cashed the drafts, and forwarded them for acceptance to Kleinwort Sons & Company at London, who accepted them on April 6, 1898, and paid them when due. At the time these bills of exchange were accepted the bills of lading, indorsed by Pla Gibernau & Company, came into the possession of the claimants.

The vessel sailed from Montevideo for Havana on March 16, 1898. On April 25, 1898, war between Spain and the United States was declared, and on May 17, when in the Bahama Channel, on her course to Havana, the Carlos F. Roses was captured by a war vessel of the United States, and sent in charge of a prize crew to Key West.

MR. JUSTICE SHIRAS and MR. JUSTICE BREWER, dissenting.

On June 2, 1898, the District Court condemned the vessel as enemy's property, seized upon the high seas. On February 9, 1899, the District Court held that, as it satisfactorily appeared from the proof that both the title and the right of possession to the cargo were in a neutral at the time of the capture, as evidenced by the indorsed bills of lading and the paid bills of exchange presented at the hearing, the claim should be allowed, and it was so ordered. Thereupon the United States took this appeal.

It is admitted that, if the cargo in question belonged to a neutral, and was not contraband of war, it was not liable to confiscation, though found in an enemy's vessel: this upon well-established principles of international law, and as within the President's proclamation of April 26, 1898, expressly declaring that "neutral goods, not contraband of war, are not liable to confiscation under the enemy's flag."

It can scarcely be pretended that, in this instance, the cargo consisted of articles contraband of war. They were the ordinary products of the Republic of Uruguay, a country with which the United States were at peace, and were purchased and shipped six weeks before war was declared. Little, if anything, is left for the commerce of neutrals if such goods, shipped in such circumstances, are not within the protection of the President's proclamation.

The question is whether the District Court erred in finding that the goods in question were neutral goods and exempt, as such, from condemnation.

The first contention, on behalf of the United States, is that the affidavits and exhibits relied on by the claimants to prove their title were not competent evidence, and it is urged that the evidence should have been in the form of depositions, taken under a commission, and of documents duly proved.

We think it is a sufficient reply to this objection that the proofs were received and considered by the District Court upon the trial entirely without objection on the part of the United States or the captors; and that the action of the court in receiving the evidence was not among the assignments of error made and filed under the appeal.

"If evidence in the nature of further proof be introduced, and no formal order or objection appear on the record, it must be presumed to have been done by consent of the parties, and the irregularity is completely waived. In the present case, no exception was taken to the proceedings or evidence in the District Court; and we should not, therefore, incline to reject the further proof, even if we were of opinion that it ought not, in strictness, to have been admitted." *The Pizarro*, 2 Wheat. 241, per Mr. Justice Story.

Rule 13 of this court is as follows:

"In all cases of equity and admiralty jurisdiction heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent."

It is next contended that the claimants' evidence, regarded as a whole, does not support the decree of the court below. It is said that the burden of proof is upon the claimants, and that this burden has not been sustained.

This was not the view of the District Court, which, as we have heretofore stated, held that it appeared satisfactorily from the proof that both the title and right of possession were in a neutral at the time of capture.

What are the matters urged against this finding of the court below?

It is argued that, because it appears in the invoices and in the manifest that the shipments were made partly on account of "the expedition or voyage of the Carlos F. Roses," partly on account of "Mr. Pedro Pagés of Havana," and partly on account of the shippers, that is, Gibernau & Company, it is a reasonable inference that it must have been known to the master that the consignees were, as to some of the cargo, enemies, and that it must be concluded, on the face of the papers, that when the goods were delivered to the vessel they became the property of the consignees named in the invoices.

Such a view loses sight of the decisive and indisputable facts that the money used by Gibernau & Company in the purchase

MR. JUSTICE SHIRAS and MR. JUSTICE BREWER, dissenting.

of the goods was procured from the London and River Plate Bank, which cashed the drafts drawn on Kleinwort Sons & Company, the claimants, and that when the latter company, on April 6, accepted the drafts they were furnished with the bills of lading covering the entire shipment; that the said bills of lading, at the time of such delivery, were duly indorsed in blank by Gibernau & Company, the shippers, and to whose order the said cargo was by the terms of the bills of lading to be delivered, all with the intent and result of entitling Kleinwort Sons & Company to the said bills of lading and to the cargo described therein as security for their acceptance of the drafts. It hence was entirely immaterial whether the ultimate consignees were, as to some of the cargo, residents of the enemy's country, and whether that fact was known to the master. Under the facts proved by the claimants the latter, through the London and River Plate Bank, had furnished the money used in the purchase of the goods, before the sailing of the vessel. This is made plainly to appear by the invoices furnished by the shippers, and wherein is stated that the master received the goods from Pla Gibernau & Company, and wherein also there is a statement of the cost of the goods and of the commissions charged by Gibernau & Company, corresponding in amount to the drafts.

The fact that the claimants' proofs do not set forth the correspondence between the claimants and the ultimate consignees is made a matter of unfavorable comment. But the transactions were substantially described in the affidavits, and it is not easy to see what further light would have been afforded by such correspondence, if, indeed, there was such correspondence.

The purchase of the goods, the drawing and cashing of the drafts, the indorsement and delivery of the bills of lading, all took place before the sailing of the vessel, and long before the declaration of war, and before there was any reason to anticipate hostilities. The drafts were accepted before the war, and were paid before the seizure of the vessel.

No counter evidence was offered by the United States, although the case was pending in the District Court from June 6, 1898, to February 9, 1899, when the decree in favor of the claimants was entered. It is, of course, true that the burden

of proof was on the claimants, but when the Government elected to stand on the proof adduced by the claimants, every fair and reasonable intendment must be made in favor of that proof. If the case so made out is consistent with the rightfulness of the claim, it should not be defeated by mere suggestions and suppositions, not founded on evidence. "All reasonable doubts shall be resolved in favor of the claimants. Any other course would be inconsistent with the high administration of the law and the character of a just government." *Prize Cases*, 2 Black, 635.

The final contention on behalf of the United States is that, even if the facts of the case were as set forth in the claimants' proofs, and as found by the District Court, yet, as matter of law, the claimants cannot succeed, because "the right of capture acts on the proprietary interest of the thing captured at the time of the capture, and is not affected by the secret liens or private engagements of the parties; that hence prize courts have rejected in its favor the lien of bottomry bonds, of mortgages, for supplies, and of bills of lading; . . . that claimants did not obtain the *jus in rem*, and, according to the great weight of authority, the right of capture was superior."

To sustain this proposition the following cases are cited: *The Mary and Susan*, 1 Wheat. 25; *The Frances*, 8 Cranch, 418; *The Sally Magee*, 3 Wall. 451; *The Hampton*, 5 Wall. 372; *The Battle*, 6 Wall. 498; *The Tobago*, 5 C. Rob. 218; *The Marianna*, 6 C. Rob. 24; *The Ida*, 1 Spinks' Prize Cases, 331.

The *Mary and Susan* was a case where an American house had ordered the purchase of goods in England before the declaration of war, and where their English agents had assigned the goods to certain brokers to secure advances made by them. The goods were captured en route to America, and were libelled in the District Court of the District of New York as prize of war. But it was held, both in the Circuit Court and in this court, that the property had vested in the American firm, who were the claimants, before and at the time of shipment, and was not divested by a mere request made by the shippers to the consignees to remit the purchase money to the bankers, although in the invoice it was stated that the goods were the property of the bankers.

MR. JUSTICE SHIRAS and MR. JUSTICE BREWER, dissenting.

The transaction was regarded, not as a transfer of the goods, but as merely intended to transfer the right to the debt due from the consignees. No bills of exchange were drawn on the consignees in favor of the English bankers, nor were any bills of lading indorsed to them. The evidence of the transaction was found only in letters addressed to the consignees by the shippers, requesting them to pay the purchase money to the bankers; and this court held, after a careful examination of the evidence, that there was no intention to secure the bankers by any transfer of the title of the property, but only to secure them by a transfer of the debt due from the consignees.

The case of *The Frances* was an appeal from the sentence of the Circuit Court of Rhode Island, condemning certain British goods, captured on board the Frances, and which were claimed by Thomas Irvin, a domiciled merchant of the United States, on the ground of lien. It was stated by Mr. Justice Washington that "it was not pretended that the real ownership in these goods was not vested in the consignors, enemies of the United States; but the claimant founds his pretensions on a lien created on the goods consigned, in consequence of an advance made to the shippers, in consideration of the consignment, by his agent in Glasgow, and also in virtue of a general balance of account due to him as their factor." And it was held that while, according to the common law, a factor has a lien upon the goods of his principal in his possession, for the balance of account due him, and likewise a consignee for advances made by him to the consignor; yet that this doctrine is unknown in prize courts, unless in very peculiar circumstances. And the court referred to the case of *The Tobago*, 5 C. Rob. 196, where it was held that a lien on a vessel created by a bottomry bond was not protected from capture.

It will be seen that in this case of *The Frances*, as in the case of *The Mary and Susan*, there was no question of the effect of a transfer of title by bills of lading, but a mere assertion of a lien by virtue of common law principles.

The *Sally Magee* is the next case cited. This was the case of an enemy's vessel bound for an enemy's port. A portion of the cargo was claimed by Fry, Price & Company, for Coleman &

Company, a Rio firm, because, as was alleged, Coleman & Company, as factors and commission merchants, had been directed to purchase and ship for the account of Davenport & Company, of Richmond, Va., a cargo of coffee, if procurable at not over ten and a half cents per pound; that Coleman & Company did make the shipment of the cargo claimed to the consignment of Davenport & Company, but that by the invoice thereof it appeared that the said purchase was not made at or within the said limit; for which cause Davenport & Company had refused to receive it as purchased for their account, or otherwise than on account of the shippers, Coleman & Company, and as agents of necessity for them; and that Davenport & Company had been authorized to receive it in their place and behalf. Another claim related to the residue of the cargo, also coffee, consigned to Dunlop & Company, of Richmond. It was not denied that this portion of the cargo was enemy's property, but the claimants alleged a lien because of a balance due claimants by Dunlop & Company.

In respect to the first claim, it was held that if Coleman & Company, as factors, bought the coffee at a price exceeding the limit prescribed by Davenport & Company, and the latter, on learning the fact, repudiated the purchase, the title of the factors thereupon became absolute, and none passed to the principals for whom the purchase was made; but that there was an entire failure, on the part of the claimants, to prove the facts as alleged, although more than two years had elapsed between the filing of the claim and the time when the decree was rendered. Accordingly, the decree of condemnation as to that portion of the cargo was affirmed.

The language of the court in disposing of the second claim was as follows:

"The other claim relates to the coffee consigned to Dunlop & Company, of Richmond, and it is not denied that this was enemy's property. The claimants allege a lien. The claim states that Dunlop & Company owed them a balance of upward of $35,326, and that they were authorized and directed by that firm to receive and sell the coffee, and apply the proceeds, as far as necessary, to the payment of the debt, and to hold the

MR. JUSTICE SHIRAS and MR. JUSTICE BREWER, dissenting.

balance for the debtor firm. The same affiant made the test affidavit, as in the other case. He referred, as in that case, to an important correspondence, and failed to produce it. The same remarks apply to that subject. It is to be inferred, also, that the letters were written after the shipment of the cargo, and, indeed, after the capture. In either case, the arrangement was made too late to have any effect.

"The ownership of property in such cases cannot be changed while it is *in transitu*. The capture clothes the captors with all the rights of the owner which subsisted at the commencement of the voyage, and everything done thereafter, designed to incumber the property or change its ownership, is a nullity. No lien created at any time by the secret contention of the parties is recognized. Sound public policy and the right administration of justice forbid it. This rule is rigidly enforced by all prize tribunals. The property was shipped to the enemy. It was diverted from its course by its capture. The allegation of a lien wears the appearance of an afterthought."

It will be observed that there was no effort in this case to claim property vested or transferred by bills of lading. Indeed, it appeared that the bills of lading were made out in favor of the consignees at Richmond, and it was said by the court that the legal effect of a bill of lading was to vest the ownership in the consignees, citing *Lawrence* v. *Minturn*, 17 How. 100, in which it was said that "the general effect of a bill of lading to raise a presumption of property in goods in him to whom it makes them deliverable, is conceded."

Next comes the cited case of *The Hampton*, libelled and condemned as prize of war in the Supreme Court for the District of Columbia. It was held that mortgages on vessels captured *jure belli* are to be treated only as *liens*, subject to be overridden by the capture, not as *jura in re*, capable of an enforcement superior to the claims of the captor.

Then comes the case of *The Battle*, where there were claimants against the proceeds of sale of an enemy's vessel for supplies furnished and for materials furnished and for work and labor. The claims were dismissed by the District Court of the United States, and on appeal that decree was affirmed by this court,

which, through Justice Nelson, said: "The principle is too well settled, that capture as prize of war overrides all previous liens, to require examination," citing the cases of *The Hampton* and *The Frances*.

These are all the American cases cited, and it is to be observed that, in none of them, was the court called upon to decide the question whether bills of lading made or indorsed to neutrals, before the declaration of war, on account of money furnished to purchase cargoes, are protected as neutral goods from capture, within the general international rule, and the President's proclamation, protecting such goods, when not contraband, from condemnation as prize of war. The doctrine of these cases simply amounts to the proposition, that bottomry bonds, mortgages and private agreements that factor's balances and advances should be preferred claims, are mere *liens*, which create no property rights in vessels or cargoes, superior to the captor's rights.

Let us now examine the English cases cited.

The first is that of *The Tobago*, 5 C. Rob. 218. This was the case of a bottomry bond, and it was held that such a bond confers no property in the vessel; that the property continues in the former proprietor, who has given a right of action against it, but nothing more. In the case of *The Marianna*, 6 C. Rob. 24, there was a claim against a Spanish vessel, for unpaid purchase money on the vessel which had been sold by an American owner to a Spanish merchant, but which was to be satisfied out of the proceeds of a quantity of tallow consigned to England on board this vessel for sale. Sir William Scott said:

"A claim is given on behalf of the former American proprietor, in virtue of a lien which he is said to have retained on the property for the payment of the purchase money, but such an interest cannot, I conceive, be deemed sufficient to support a claim of property in a court of prize."

In respect to the goods which were said to have been pledged to secure the payment of the purchase money of the ship, Sir William Scott said:

"Then as to the title of property in the goods which are said to have been going as the funds out of which the payment for

MR. JUSTICE SHIRAS and MR. JUSTICE BREWER, dissenting.

the ship was to have been made. That they were going for the payment of a debt will not alter the property; there must be something more. Even if bills of lading are delivered, that circumstance will not be sufficient, unless accompanied with an understanding that he who holds the bill of lading is to bear the risk of the goods as to the voyage, and as to the market to which they are consigned; otherwise, though the security may avail *pro tanto*, it cannot be held to work any change in the property."

It will be noticed that the shipper of the goods in this case was the Spanish merchant, an enemy.

Finally, the case of *The Ida* is relied on. 1 Spinks' Prize Cases, 331. The statement of the case was as follows:

"The claim of neutral merchants for 2650 bags of coffee, consigned to them on the credit of advances made by them was disallowed. The claim is that of *lien*, which cannot be upheld against captors. Further proof cannot be allowed when there has been an attempt to deceive the court by simulated papers."

In considering the evidence in the case, Dr. Lushington said:

"Now, that simulated bill of lading was certainly framed for some purpose or other by desire of the master. It is a well-known rule of this court that where there are contradictory papers the burden of proof lies on the claimant to show that the contradiction is not inconsistent with the rights of a belligerent power; and, I must say, I have not heard any satisfactory explanation of how or why these papers were framed, except it was for the purpose of deceiving those who might have to determine whether it was an enemy's property or not."

In discussing the law of the case, Dr. Lushington said:

"It is contended by counsel that the property is in Behrens & Company by virtue of the endorsement of the bills of lading; and cases from common law have been cited in support of this. I believe that, in some circumstances, that would be the case. They would have a legal title to the property; but I have considerable doubt whether it is not the law of this court that the claimant must show that he has not only a legal, but an equitable title. If a mere legal title would justify the court in restoring property the consequences would be most alarming;

for nothing would be more easy than to cover enemies' property from one end of the kingdom to the other. I strongly object to the doctrine that if a legal title be shown this court is bound to restore; for I hold that an equitable title is also necessary to support a claim in this court."

Upon the whole, the learned judge was of the opinion that the property belonged to an enemy, subject to claimant's charges, and that it was not possible to doubt for a single moment that there was an intention in the case, by means of colorable bills of lading, to deceive and defraud Great Britain of its belligerent rights, by attempting to cover enemy's property as neutral.

The case of *The Ida* can therefore be cited as conceding that, if the claimants had vested in them the legal title to the goods by virtue of the indorsement of the bills of lading, and had also an equitable title, they would be entitled to a judgment of restoration. But the court was of opinion that there was no evidence whatever of any portion of the cargo belonging to a neutral. While it was true that the claimants exhibited a bill of lading indorsed to them, yet another bill of lading not indorsed was found on capture in possession of the master. Such a state of facts justly created a belief that the transaction was essentially fraudulent, as an attempt to cover enemy's property.

We shall now consider some of the cases cited on behalf of the claimants.

The Amy Warwick, 2 Sprague, 150; 2 Black, 635, is, in several respects, a leading case, and is decisive of the present one. It was there held that, where a neutral commission merchant purchased a cargo of coffee for enemy correspondents, partly with their funds and partly with his own, and shipped it under a bill of lading by which it was to be delivered to his order, having a legal title and a beneficial interest, a prize court should award him the amount of his advances, although the residue of the property will be condemned as enemy's.

After a full statement of the facts, the conclusion was thus stated by Judge Sprague:

"The claim of J. L. Phipps & Company was filed on the 4th of September last. It alleges that this coffee was purchased by them partly by funds of Dunlop, Moncure & Company, of Rich-

MR. JUSTICE SHIRAS and MR. JUSTICE BREWER, dissenting.

mond, and partly by £2000 of their own money; that the legal title has always remained in them, and that no other person is the legal owner, except the equitable interest of said Dunlop, Moncure & Company.

"These facts seem plainly to lead to the conclusion that the claimants ought to be repaid the amount which they expended from their own funds in the purchase of the coffee, and that the residue of the proceeds should be condemned. This result I shall adopt, unless precluded from doing so by authority.

"The counsel for the captors contend that the claimants had only a lien, and that liens will not be protected or regarded in a prize court. This position is sustained by the authorities as to certain kinds of liens. The extent of this doctrine and the reasons on which it is founded are stated by the Supreme Court in *The Frances*, 8 Cranch, 418. It is there said that 'cases of liens created by the mere private contract of individuals, depending upon the different laws of different countries, are not allowed, because of the difficulties which would arise in deciding upon them, and the door which would be open to fraud.' Similar reasons are given by Lord Stowell in *The Marianna*, 6 C. Rob. 24, and in several other cases. These reasons are especially applicable to latent liens created under local laws. They do not reach the case now before the court. This coffee was purchased by the claimants at Rio, and shipped by them on board this brig under a bill of lading, by which the master was bound to deliver it to their order, and they ordered it to be delivered to J. L. Phipps & Company, that is, to themselves. They then retained the legal title, and the possession of the master was their possession. Being the legal owners of the property, they can hardly be said to have a lien upon it; a lien being in strictness an incumbrance upon the property of another. Their real character was that of trustees holding the legal title and possession, with a right of retention until their advances should be paid. . . . The case of *The San Jose Indians*, 1 Wheat. 208, has been cited by the counsel for the claimants, and they contend that it sustains their whole claim, and requires all the coffee to be restored to them. That case is a stringent authority to the extent of the £2000 which the claimants invested or ad-

vanced in the purchase; but I do not think that it authorizes me to go further."

This case was taken to the Circuit Court and there affirmed. No appeal was taken to the Supreme Court from that part of the decree which allowed the claim of Phipps & Company. The decree of condemnation of the residue was affirmed. 2 Black, 635.

The bark Winifred was captured in May, 1861, off Cape Henry, and confiscation of vessel and cargo was demanded as being enemy's property. The cargo, consisting of 4200 bags of coffee, had been purchased by Phipps & Company in Rio, as agents for Crenshaw & Company, Richmond merchants. Phipps & Company advanced their own funds to the extent of three eighths of the cargo. The consignment formally was to shipper's order, but the bills of lading were sent forward indorsed to Crenshaw & Company. Subsequently, Phipps & Company made further advances of $20,622 on April 26, while the goods were in transit, and, after the outbreak of hostilities, taking a reassignment of the bills of lading. The District Court ordered a restoration of three eighths of the cargo to Phipps & Company, but refused to allow their claim for the further advances on the other five eighths of the cargo, citing *The Marianna*, 6 C. Rob. 24, and *The Frances*, 8 Cranch, 418. But on appeal the Circuit Court, while affirming the decree allowing the claim against the three eighths of the cargo, reversed that part of the decree which refused the claim for the further advances, allowed further proofs, and in December 1863, allowed the entire claim of Phipps & Company, with interest. *The Winifred*, Blatchford's Prize Cases, page 35, and note.

The Lynchburg was captured with her cargo in May, 1861, at the mouth of Chesapeake Bay. Two thousand and forty-five bags of coffee, part of her cargo, had been purchased by Maxwell, Wright & Company, as agents for Wortham & Company, of Richmond. Maxwell, Wright & Company took bills of lading, consigning the cargo to their own order, and drew against them on Brown, Shipley & Company, of London, for £6090, who accepted the drafts and subsequently paid them. The entire cargo was destined ultimately for enemies. Wortham &

Company, of Richmond, claimed 504 bags of this shipment, subject to the lien of Brown, Shipley & Company. The District Court restored to Brown, Shipley & Company 1541 bags, but condemned the 504 bags claimed by Wortham & Company as enemy's property. Judge Betts said:

"The claim to an absolute ownership of the 2045 bags was placed before the court in the oral argument and in the written points filed in the cause by the counsel for the claimants, upon the proposition of law that a bill of lading, transmitted to them by the shipper to cover advances, passed to them the title to the cargo purchased therewith. If this doctrine be correct as to mere commercial transactions, it does not prevail in prize courts in derogation of the rights of captors, when the interest of the claimant is only a debt, although supported by liens equitable and tacit, or legal and positive, even of the character of bottomry bonds, when not signified on the ship's papers at the time of capture. *The Frances*, 8 Cranch, 418; *The Tobago*, 5 C. Rob. 218; *The Marianna*, 6 C. Rob. 24."

On appeal the Circuit Court affirmed as to the allowance of the claim of Brown, Shipley & Company for the 1541 bags, but reversed the refusal of their further claim for 504 bags, allowed the claimants to give further proofs, and ultimately the 504 bags were restored by consent to the claimants. *The Lynchburg*, Blatchford's Prize Cases, 51, and note on p. 52.

The exigencies of trade have called a class of instruments into being which are substantially acknowledgments by public or private agents that they have received merchandise, and from whom or on whose account; and usage has made the possession of such documents equivalent to the possession of the property itself. Among them the most notable is the bill of lading, in respect to which, and replying to the question whether at law the property of goods at sea passes by the indorsement of a bill of lading, Buller, J., said, in his opinion in *Lickbarrow* v. *Mason*: "Every authority which can be adduced, from the earliest period of time down to the present hour, agree that at law the property does pass as absolutely and as effectually as if the goods had been actually delivered into the hands of the con-

signee." Smith's Leading Cases, vol. part 11, 7th Am. ed. under the head of *Lickbarrow* v. *Mason*.

The conclusion warranted by the cases is that, as well advances made for the purchase of goods, as an absolute purchase, are protected by bills of lading, whether made out directly to the party purchasing or making the advancements, or indorsed to him by the shipper.

While possession of the bills of lading imports a legal title to the goods, yet in prize cases it is permitted for the courts to go behind the bills of lading, if there is evidence tending to show that the party in whose name they are issued, or to whom they have been indorsed, has no equitable interest or is a mere cover to an enemy. In the present case there was no transfer of the property from an enemy to a neutral. Up to the time of shipment the entire cargo was owned by Pla Gibernau & Company. They transferred it to the London and River Plate Bank, Limited, who in turn transferred it to Klienwort Sons & Company, who produced the bills of lading at the hearing and moved the payment by them, before the capture of the vessel, of the drafts whose negotiation furnished the moneys used in the purchase of the goods. The entire issue of each set of bills of lading was possessed by Kleinwort Sons & Company, under indorsements which gave to them only the right to demand delivery from the vessel.

The case falls plainly within the law as administered in *The Amy Warwick*, *The Winifred* and *The Lynchburg*.

If the rule asked for by the captors in this case should be upheld, namely, that bills of lading indorsed to neutrals, acting in good faith, who have advanced money to purchase goods shipped long before the declaration of war, do not create a right of property in the goods, there would be very little room left for the operation of the President's proclamation exempting neutral goods from condemnation. Such a rule would be very unfortunate as respects the commerce of the United States in case of hostilities between European countries. Owing to the limited amount of merchant shipping owned in the United States, the greater part of their products, whether breadstuffs or manufactured goods, has to be carried in foreign vessels, and

MR. JUSTICE SHIRAS and MR. JUSTICE BREWER, dissenting.

it is quite evident that bankers and capitalists could not afford to advance the moneys needed to make purchases, if they could not be protected against seizure by foreign belligerents, by the indorsement to them of bills of lading. Only those who actually own the goods could safely ship them on vessels owned by belligerents, and, what constitutes the larger part of international trade, the purchase and shipment of merchandise by factors with moneys advanced by banking houses would, in case of war, have to cease. The decree of the District Court should be affirmed.